Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 27, Original

THE STATE OF OHIO,
Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant.

REPORT OF SPECIAL MASTER

ROBERT VAN PELT
Senior U.S. District Judge
Lincoln, Nebraska
Special Master

JOE CHRISTENSEN, INC., 1540 Adams, Lincoln, Nebraska

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This original action instituted in March, 1966, involves the determination of the boundary between the State of Ohio and the Commonwealth of Kentucky insofar as the Ohio River constitutes their common boundary.

Jurisdiction was invoked under Article III, Section 2, Clause 2, of the Constitution of the United States.

The Honorable Phillip Forman was the first Special Master appointed in the case. 385 U.S. 803 (1966). In 1977, Judge Forman, who was then in poor health, submitted his resignation. The writer was appointed to succeed him on July 28, 1978. Judge Forman died August 17, 1978. Mr. Justice Blackmun in 1973 delivered an opinion for the Court, with Mr. Justice Douglas dissenting, which is hereafter discussed at length. *See Ohio v. Kentucky*, 410 U.S. 641.

BACKGROUND HISTORY

It will facilitate the reading of this report to review certain facts.

Mr. Justice Blackmun, in the opinion above cited, stated the history of this case as follows:

> Almost seven years ago, in March 1966, the State of Ohio instituted this original action against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Ohio asked only that the Court declare and establish:
>
> "1. The boundary line between the State of Ohio and the State of Kentucky as being the low water mark on the northerly side of the Ohio River in the year 1792. . . .
>
> "2. The State of Ohio and the State of Kentucky have equal and concurrent jurisdiction over and on all of the Ohio River from the northerly shore to the southerly shore, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto."
>
> In its complaint Ohio alleged:
>
> "4. The State of Ohio was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.
>
> "5. The State of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that certain act of the Virginia Legislature entitled 'An Act concerning the erection of the district of Kentucky into an independent state,' passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact.
>
> "6. The northern boundary line of the State of Kentucky was established from the Cession of Virginia and the Virginia-Kentucky Compact as the low water mark on the northerly side of the Ohio River as it existed in the year 1792."[1]

Ohio went on to allege: From 1910 to 1929, the United States erected dams in the Ohio River for navigational pur-

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1. 1792 is the year Kentucky became a State. 1 Stat. 189.

poses. Since 1955, it has been replacing the earlier dams with higher ones. This has caused the waters of the river to rise and permanently inundate various areas of both Ohio and Kentucky. "As a result, the shores or banks of the Ohio River have been moved farther northerly and southerly as the water levels have increased by the damming of the river." The north low water mark of 1792 "has been obscured by the increased elevation of the water levels." Kentucky has claimed that the line between the two States is "along the present northerly shore line of the Ohio River rather than the 1792 northerly low water mark which is located to the south of the present north shore line." Ohio "does now and has always claimed . . . that the boundary between it and Kentucky is the 1792 northerly low water mark."

Leave to file the bill of complaint was granted. 384 U.S. 982 (1966). Kentucky by its answer admitted the allegations of the above-quoted numbered paragraphs of Ohio's complaint. . . .

Five years later, in August 1971, Ohio moved for leave to file an amended complaint. By this amendment Ohio would assert that the boundary between it and Kentucky is the middle of the Ohio River, or, only alternatively, is the 1792 low water mark on the northerly shore. We referred the motion to the Special Master. 404 U.S. 933 (1971). He held a hearing and in due course filed his report. 406 U.S. 915 (1972). The Master recommended that this Court enter its order denying Ohio's petition for leave to amend. His conclusion rested on the ground "that the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action." Report 16. Upon the filing of Ohio's exceptions and Kentucky's reply, we set the matter for argument. 409 U.S. 974 (1972).

Id. at 642-44.

Exceptions were argued January 10, 1973. The motion for leave to amend was denied in *Ohio v. Kentucky, supra*, and the case was remanded to the Special Master for further proceedings.

In May, 1974, following remand, the parties entered into a stipulation which was approved by Judge Forman on May 31, 1974. The original,[a] which was contained in

a. A copy is reproduced as Appendix #1 to this report.

his file hereafter mentioned, will be filed with the Clerk of this Court.

The parties agreed[b] that the issues submitted to Judge Forman under this stipulation should be resubmitted to me as his successor.

Your Special Master reports that Mr. Angelo W. Locascio, Clerk of the United States District Court for the District of New Jersey, on July 31, 1978, writing on behalf of Judge Forman, furnished him Judge Forman's files, including a rough draft of certain findings which Judge Forman was considering for his report to this Court.

THE SOLE ISSUE

Judge Forman's papers indicate that he had concluded under the stipulation that there was submitted to him this question: Whether the boundary line between Kentucky and Ohio is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 or the low-water mark on the northerly side of the river as it exists today? I agree with this statement of the issue and will confine this report to that issue only.

FURTHER FACTS AND APPLICABLE LAW

This case arises in part because of the movement of the Ohio River to the north and west since 1792. In addition, large dams have been erected on the river by the United States causing inundation of the 1792 north and south banks of the Ohio. Thus, the north and west shore line has moved or been moved even farther north and west. *See Ohio v. Kentucky, supra* at 643; Kentucky's Ohio River Boundary From The Big Sandy to the Great Miami, Informational Bull. No. 81, Kentucky Legislative Research Comm. (1969); Kentucky's Ohio River Boundary

b. The letters to this effect from the offices of the two Attorneys General will be submitted to the Clerk for filing with this report.

From The Great Miami to the Wabash, Informational Bull. No. 93, Kentucky Legislative Research Comm. (1972), which had been marked No. 2 and 3, respectively, prior to delivery to your Special Master as a part of Judge Forman's file.[c]

This is not the first time the location of state boundaries on the Ohio River has had to be settled by this Court. In *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820), Chief Justice Marshall, in delivering the court's opinion, stated in part:

> The two exceptions present substantially the same questions to the court, and may, therefore, be considered together. They are, whether land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low ? and whether Kentucky was bounded on the west and north-west by the low-water mark of the river, or at its middle state? or, in other words, whether the state of Indiana extends to low-water mark, or stops at the line reached by the river when at its medium height?
>
> In pursuing this inquiry, we must recollect, that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to congress all her right to the territory "situate, lying and being to the north-west of the river Ohio." And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.
>
> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary.

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c. Informational Bulletins Nos. 81 and 93 will be filed with the Clerk of the Supreme Court with this report.

Id. at 378. The Chief Justice further noted that if the river itself was the boundary, the limits of Indiana would be determined by the rise and fall of the river and the same land would sometimes be in Kentucky and sometimes in Indiana. In determining that the boundary would be the low-water mark, the Court stated:

> The principle, that a country bounded by a river, extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason, why it should not apply to this.

Id. at 383.

Like Indiana, Ohio received its territory from the United States. Therefore, in ruling on the motion of Ohio to amend its complaint to allege that the middle of the river constituted the boundary between the State of Ohio and the Commonwealth of Kentucky, it is not surprising that this Court in its previous opinion in this case discusses *Handly's Lessee*, *supra*. This Court in its prior opinion in this case said:

> In *Handly's Lessee v. Anthony*, 5 Wheat. 374 (1820), this Court stated that the boundary between Indiana and Kentucky was the low water mark on the western or northwestern side of the Ohio River. *Handly* was an action for ejectment brought by a plaintiff claiming under a grant from Kentucky against defendants claiming under a grant "from the United States, as being part of Indiana." *Id.*, at 375. The disputed land was a neck south of a channel, or bayou, that had formed north of the main river. When the river was high, the channel filled and cut off the land to the north. When the river was low, the channel was dry in part and the separation did not exist. The resolution of the case turned on whether the land was in Indiana or in Kentucky. Indiana, like Ohio, received its territory from the United States. The Court in *Handly* observed that the question "depends chiefly on the land law of Viriginia, and on the cession made by that State to the United States," *id.*, at 376, and concluded that the United States acquired title from Virginia when negotiations during the period from 1781-1784 resulted in Virginia's ceding its lands north and west of the Ohio River to the Fed-

eral Government.[2] Kentucky was received as a State of the Union in 1792 out of territory Virginia purported to retain at the time of the 1784 cession. The Court concluded, on the basis of this history, that Kentucky, through Virginia, extended up to the low water mark on the northern, or far, side of the Ohio River. Mr. Chief Justice Marshall enunciated the following, now familiar, principle:

> "When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary." 5 Wheat., at 379.

The rule of the *Handly* case, as well as its specific application to the Kentucky-Indiana border, has been consistently adhered to in subsequent decisions of this Court. *Indiana v. Kentucky*, 136 U.S. 479 (1890) (despite Indiana's argument, *id.*, at 486-493, that its boundary was the middle of the river); *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899);[3] *Nicoulin v. O'Brien*, 248 U.S. 113 (1918). It has been

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2. Recommendation of the Continental Congress, September 6, 1780, 10 W. Hening, Laws of Virginia 562 (1822); Resolution of the General Assembly of Virginia, January 2, 1781, conditioned, among other things, upon ratification of the Articles of Confederation and upon like cessions by other States, *id.*, 564, 567; Act of the Continental Congress, September 13, 1783, 25 J. of the Cont. Cong. 1774-1789, p. 559 (1922); Act of Confirmation, October 20, 1783, 11 W. Hening, Laws of Virginia 326 (1823); Act of the Continental Congress, March 1, 1784, 1 Laws of the United States 472 (B. & D. ed. 1815).

The 1781 Virginia resolution recited that the Commonwealth "will yield to the congress of the United States . . . all right, title, and claim that the said commonwealth hath to the lands northwest of the river Ohio." 10 W. Hening, Laws of Virginia 564 (1822). Among the proposed conditions was also a guarantee by the United States to Virginia of "all the remaining territory of Virginia included between the Atlantic Ocean and the south east side of the river Ohio." *Id.*, at 566. This latter condition was not agreed to by the Congress by its Act of 1783. 25 J. of the Cont. Cong. 1774-1789, p. 563 (1922).

The 1783 Act referred to territory "to the north-west of the river Ohio." 11 W. Hening, Laws of Virginia 327. So, too, did the deed of March 1, 1784, from Virginia to the United States accepted by Congress on the same day. 1 Laws of the United States, *supra*, at 474.

3. "Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the bound-

explicitly recognized by the Supreme Court of Ohio in *Booth v. Shepherd*, 8 Ohio St. 243, 247-248 (1858), where it was stated with far greater precision than the mere assumption the dissent suggests, *post*, at 654-655, that:

> "The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

See also *Lessee of McCullock v. Aten*, 2 Ohio 307, 310 (1826); *Lessee of Blanchard v. Porter*, 11 Ohio 138, 142 (1841).[4] See *Commonwealth v. Garner*, 3 Gratt. 655 (Gen. Court of Va. 1846).

Id. at 645-47.

If the foregoing is insufficient to determine the issue of whether the low-water mark of 1792 or of today marks the boundary between the State of Ohio and the Commonwealth of Kentucky, we can turn to *Indiana v. Kentucky*, 136 U.S. 479 (1890) (Original No. 2 in this Court) for further guidance.

Both Kentucky and Indiana claimed possession and jurisdiction over Green River Island, a tract nearly five miles long and half a mile wide lying on the north side of the Ohio River. Kentucky alleged: 1) That when it became a state in 1792, its boundaries extended to the northerly low-water mark of the Ohio River and that in 1792 the river ran north of Green River Island, 2) that it had long undisturbed possession of the island, and 3) there had been recognition of its rights by legislation of Indiana. Indiana rested its claim upon the fact that when it was admitted to the Union in 1816 its southern bound-

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ary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River." *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 613 (1899).

4. There is a possible intimation to the contrary in the bridge tax case of *Covington & Cincinnati Bridge Co. v. Mayer*, 31 Ohio St. 317, 327, 329 (1877). The case appears, however, to have been resolved on the content of the bridge company's Ohio charter granting permission for the erection of the bridge. See *Sebastian v. Covington & Cincinnati Bridge Co.*, 21 Ohio St. 451 (1871).

ary was designated as the Ohio River. In 1890, when the case was decided in this Court, the Ohio ran south of Green River Island. A map reproduced at 136 U.S. 485 clearly shows the river boundary at the time of an 1806 survey and the low-water mark line on the north-west side of the river in 1888. Indiana alleged the river ran south of Green River Island in 1816.[d] Relying on the principles enunciated in *Handly's Lessee, supra*, the Court stated:

> But the question here is not, as if the point were raised today for the first time, to what State the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State, separated from the mainland of Indiana by the waters of the Ohio River. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two States. That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress. If when Kentucky became a State on the 1st of June 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

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d. The opinion mentions that changes in the river were to be expected because of several vast watersheds which altered the course of the river in the area of Green River Island.

> The question then becomes one of fact, did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established?

Id. at 508-09. The Court then discussed acquiescence and prescription, a subject dealt with later in this report. The Court specifically recognized in its opinion that in 1792 the waters of the Ohio River flowed north of Green River Island, concluding that the northern and western boundary of the State of Kentucky was the northerly low-water mark of the Ohio River as it existed in 1792 and not as it existed at the time of the litigation. The last paragraph of the opinion reads:

> Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

Id. at 518-19.

Kentucky seeks to distinguish these cases. It argues that in *Handly's Lessee, supra*, there is language to the effect that Virginia or any state deriving property from her retains the river within its own domain and the river constitutes the boundary. Kentucky argues that Virginia must have intended the boundary to be a natural moving and continuing line and that it follows that Ohio's claim that the boundary became fixed in 1792 is without merit. Kentucky also argues that *Indiana v. Kentucky, supra*, should be read to concern itself only with the ownership of Green River Island and not the determination of the entire boundary between the two states along the Ohio River. However, this completely ignores the premise in *Handly's Lessee*, which provided substantial foundation for the *Indiana* decision, that

> The state of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself.

Id. at 384.

Your Special Master believes that *Indiana v. Kentucky, supra*, answers Kentucky's arguments in this case in three sentences above quoted.

> She [Kentucky] succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

Id. at 508.

Thus, this Court long ago invalidated Kentucky's present contentions. Your Special Master concludes that the decisions in *Indiana v. Kentucky, supra*, and *Handly's Lessee, supra*, control this case.

ACQUIESCENCE AND PRESCRIPTION

In light of the clear case law above discussed, it may be unnecessary to resort to the doctrine of prescription and acquiescence in deciding this case. As a matter of fact, Ohio's letter of October 11, 1974, to Special Master Forman, which serves as a reply brief, states that if the Special Master reaches the issue of acquiescence, the parties should be directed to submit evidence on the issue since it calls for a fact determination. Taking of evidence has not been requested of either party although both parties have made certain statements on the issue in their briefs. None of these statements outweigh the case law.

It does appear that Kentucky has recognized the 1792 low-water mark boundary in the recent past.

The Legislative Research Committee of the Kentucky General Assembly, which authored the Informational Bulletins marked Nos. 2 and 3, and above mentioned, stated in Bulletin 93 at page 3:

> Kentucky's North and West boundary, to-wit, the low river mark on the North shore of the Ohio River as of 1792, has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia.

As mentioned in Ohio's brief, the office of the Kentucky Attorney General issued a 1963 opinion, OAG 63-847, stating in the syllabus:

> The boundary between Kentucky and Indiana is the low-water mark on the northern shore of the Ohio river as such mark was at the time Kentucky became a state in 1792. Kentucky sportsmen do not have a right under their licenses to fish right up to the bank on the Indiana side of the river, since under present water levels as affected by dams they may well be past the low-water mark and into Indiana territory.

Kentucky Attorney General Opinions 1960-64.

Kentucky has submitted copies of three bridge agreements with Ohio whereby it is stated that the location of the north (or east as the case may be) low-water mark of the Ohio River shall be as determined and designated by the Corps of Engineers, U.S. Army, and shall be considered as the boundary line between the State of Ohio and the Commonwealth of Kentucky. These contracts were executed in 1963, 1964 and 1968. Ohio alleges that there are other contracts which use the same line but which specifically provide that it shall not be considered as a determination of the location of the boundary. Your Special Master concludes that it would not be of benefit to take evidence involving the bridge contracts. Undoubtedly an agreement as to the boundary was made merely to expedite and facilitate the construction of the bridges. At approximately the same time as these contracts were being

executed, there were the Kentucky legal opinions above mentioned recognizing the 1792 boundary. Your Special Master prefers to rely on the previous cases in this Court rather than bridge agreements.

Prescription and acquiescence was mentioned by Mr. Justice Blackmun in portions of the prior opinion in this case when he discussed *Handly's Lessee*. *See Ohio v. Kentucky, supra*, at 650-52. The Court in its opinion, as above quoted, recognized the effect of "long acquiescence" which has been termed by another "the long settled and never doubted" rule. Again, *Indiana v. Kentucky, supra*, is in point. The Court there held that the doctrines of prescription and acquiescence were applicable, stating:

> It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. . . .
>
> This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is pro-

tected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on the same subject, says: "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars.[1] Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." Book II, c. 11, § 149. And Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." Part II, c. IV, § 164.

Indiana v. Kentucky, 136 U.S. 479, 509-11. This doctrine has been approved by this Court in other cases including *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926); *Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 523 (1893).

Mr. Chief Justice Hughes, in *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940), concluded the principle of acquiescence and prescription is "essential to the 'stability of order' as between the States of the Union."

While this Court if it wishes can, as it did in *Texas v. Louisiana*, 426 U.S. 465 (1976), decide this case without resting its decision on the doctrine of prescription and acquiescence, the foregoing authorities are mentioned because they give support to the conclusions here reached, and the recommendations made.

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1. Footnote Omitted.

Your Special Master concludes that Ohio's claim is correct and that the boundary between the State of Ohio and the Commonwealth of Kentucky under the prior decisions of this Court is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and not the low-water mark on the northerly side as it exists today.

RECOMMENDATIONS

Your Special Master therefore recommends:

1) That the Supreme Court of the United States determine that the boundary between the State of Ohio and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and that said boundary is not the low-water mark on the northerly side of the Ohio River as it exists today.

2) That such boundary, as nearly as it can now be ascertained, be determined either a) by agreement of the parties, if reasonably possible, or b) by joint survey agreed upon by the parties. In the absence either of an agreement or survey, as provided above, within 60 days from the date of the Supreme Court's approval of this report, the Special Master, unless for good cause an extension of time is granted by the Special Master, with the approval of the Court, shall conduct hearings to determine the location of the boundary in 1792 as nearly as it can now be ascertained, and report to this Court his proposed findings and conclusions as to such boundary; that he be authorized to select and employ, prior to such hearings or during or after such hearings, a surveyor or surveyors to assist in determining such boundary line, if the Special Master deems such assistance advisable after consultation with counsel for the parties, the expense of such hearings and survey to be paid by the Special Master from funds deposited equally by the State of Ohio and the Commonwealth of Kentucky, reserving to the Supreme Court of the

United States the right, at the conclusion of this litigation, to tax all costs, including surveying costs, as it may hereafter determine to be just and reasonable.[e]

3) That the costs to date herein be taxed one-half to plaintiff and one-half to defendant and that no costs be taxed for the services either of Phillip Forman or of Robert Van Pelt, as Special Master herein.

4) That at the conclusion of this litigation the Special Master file a report, for approval by the Court, setting forth the amount of money advanced to him by the parties for the payment of costs and expenses and of the disbursement thereof, unless the parties prior thereto approve in writing the Special Master's report as to the receipt and disbursement of said moneys.

Respectfully submitted,

ROBERT VAN PELT,
Special Master

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e. Your Special Master recognizes that in an earlier case this Court appointed three Commissioners to survey and determine a similar state boundary. *See Indiana v. Kentucky*, 163 U.S. 520. Whether a Special Master or Commissioners serve is for the Court's determination.

APPENDIX A

In The

Supreme Court of the United States

October Term, 1973

NO. 27, ORIGINAL

THE STATE OF OHIO,
Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant.

BEFORE THE HONORABLE
PHILLIP FORMAN, SPECIAL MASTER

STIPULATION

The parties, by and through their counsel, and subject to the approval of the Special Master, hereby enter into the following stipulation:

1. In its complaint the State of Ohio alleged that the boundary line between the two States is the low water mark on the northerly side of the Ohio River as it existed in the year 1792;

2. In its answer the Commonwealth of Kentucky alleged that the boundary line is the low water mark on the northerly side of the Ohio River as it exists today;

3. The parties, believing that a decision as to which of these two lines is the boundary can be reached as a matter of law, have agreed to submit that question to the Special Master on briefs;

4. The briefs shall be typewritten, and the original and three clearly legible copies shall be submitted to the Special Master;

5. The brief for the State of Ohio shall be submitted to the Special Master on or before July 15, 1974;

6. The brief for the Commonwealth of Kentucky shall be submitted to the Special Master on or before September 16, 1974;

7. The State of Ohio may, if it desires, submit a short letter to the Special Master in reply to the Commonwealth's brief within ten days after receipt of such brief;

8. If either party finds it impossible to comply with the schedule in the three preceding paragraphs, it may have such additional time as is necessary, provided the Special Master and the other party consent thereto;

9. After the briefs have been submitted, oral argument will be held only if the Special Master so directs;

10. Should it appear that certain factual issues must be resolved before a decision can be reached as a matter of law, the parties shall submit evidence in such form and manner as the Special Master shall direct;

11. Evidence by metes and bounds as to the exact location of either of the two alleged boundary lines is unnecessary at the present stage of the case.

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The Commonwealth of Kentucky

APPROVED:

Phillip Forman

PHILLIP FORMAN
Special Master

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - Plaintiff,

versus

COMMONWEALTH OF KENTUCKY, - Defendant.

EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE REPORT OF THE SPECIAL MASTER FILED JANUARY 22, 1979

AND

BRIEF IN SUPPORT OF EXCEPTIONS

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IN THE

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October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - *Defendant.*

EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE REPORT OF THE SPECIAL MASTER FILED JANUARY 22, 1979

Pursuant to the Court's order,* the Commonwealth of Kentucky ("Kentucky") excepts to the Report of the Special Master filed January 22, 1979, and specifically to Recommendations 1) and 2) contained therein, as follows:

1. Kentucky excepts to the conclusion that the boundary between the State of Ohio ("Ohio") and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in

*On January 22, 1979, the Court ordered the Report of the Special Master received and filed. The Court directed that exceptions, if any, and supporting briefs were to be filed within 45 days. Mr. Justice Stewart extended the time for filing exceptions until March 23, 1979 and on March 19, 1979 said filing period was again extended by order of this Court to April 6, 1979. The Special Master's Report will be referred to herein as "Report."

the year 1792 and not the low-water mark on the northerly side as it exists today.

2. Kentucky excepts to the conclusion that application of principles of acquiescence and prescription preclude Kentucky's claim that the boundary between Ohio and Kentucky is the present low water mark on the northerly side of the Ohio River.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - *Defendant.*

BRIEF OF THE COMMONWEALTH OF KENTUCKY IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER FILED JANUARY 22, 1979

INTRODUCTION

The Commonwealth of Kentucky, having filed exceptions to the Report of the Special Master, submits this brief in support of those exceptions. A discussion of the basis of the exceptions will be first set forth to be followed by recommendations as to the remedy to be fashioned by this Court.

QUESTIONS PRESENTED

I. Whether the northern boundary of Kentucky along the Ohio River is the northerly low water mark as it presently exists and as it may change through the processes of accretion and erosion.

II. Whether legislative acts conclusively demonstrate that the boundary between Kentucky and Indiana is the current low water mark on the northerly side of the Ohio River, precluding application against Kentucky of principles of acquiescence and prescription based on said boundary.

STATEMENT OF THE CASE

This original action was instituted by the State of Ohio against the Commonwealth of Kentucky in March, 1966, to contest the boundary between the states along the Ohio River.

On March 3, 1973, this Court rejected the claim of Ohio that the boundary is in the middle of the river, and held rather that it is the low water mark on the northerly side. *Ohio* v. *Kentucky,* 410 U. S. 641. That left for consideration the competing legal contentions of Kentucky that the boundary is the present low water mark and of Ohio that the boundary is the 1792 low water mark. It also left for consideration an issue of jurisdiction of these two states over the river. The current stage of the proceedings involves only establishing the law for resolving the boundary issue.

Following remand to the Special Master after the 1973 decision, Kentucky and Ohio entered into a stipulation approved by the Special Master for submission on the sole issue as to whether as a matter of law the boundary could be adjudged as the 1972 or present low water mark.[1] The operative portions of the stipulation were in the first three paragraphs:

[1]Preliminary resolution of this issue as a matter of law is consistent with the policy noted in the 1973 opinion in favor of such determinations in cases of this kind to save time and expense.

1. In its complaint the State of Ohio alleged that the boundary line between the two States is the low water mark on the northerly side of the Ohio River as it existed in the year 1792;

2. In its answer the Commonwealth of Kentucky alleged that the boundary line is the low water mark on the northerly side of the Ohio River as it exists today;

3. The parties, believing that a decision as to which of these two lines is the boundary can be reached as a matter of law, have agreed to submit that question to the Special Master on briefs; Report, p. 18-19.

The parties submitted briefs to the Special Master, and he filed his Report containing his recommendations on January 22, 1979.

Kentucky contends that the first portion of the Report's conclusions is based on an erroneous interpretation and application of the law. Kentucky contends that the second portion concerning acquiescence and prescription is conclusively refuted by legislative acts.

These two basic exceptions to the Report, and the underlying considerations they involve, will be taken up seriatim in the Argument.

HISTORICAL BACKGROUND

At the time of the Revolutionary War the Commonwealth of Virginia owned or claimed all of the land which now comprises the Commonwealth of Kentucky and the land northwest of the Ohio River including Ohio. In the year 1784, the State of Virginia executed

a deed of cession conveying to the United States all of its territory including in the following description:

> . . . by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefits of the said States, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being, to the northwest of the river Ohio, . . . 1 Laws of the United States 472, 474 (1784).

This grant by Virginia is known as the Cession of Virginia. It is clear from the language of the Cession that the Commonwealth of Virginia reserved to herself all of the rights of ownership and possession of the Ohio River which she had previously enjoyed.

Virginia also reserved to herself ownership of the land now comprising the Commonwealth of Kentucky, and on December 18, 1789, by Act of the General Assembly of Virginia, it was decided that the then "District of Kentucky" be formed into an independent state. *See* 1 Laws of the United States 673 (1789). Pursuant to this Act, known as the Virginia-Kentucky Compact, the boundaries of the Commonwealth of Kentucky were established as the same as those of the District of Kentucky. I Laws of the United States 673, 674 (1789). In admitting Kentucky to statehood, Congress adopted as the new state's boundaries those of the District of Kentucky as they existed on December 18, 1789. 1 Stat, 189 (1791). Kentucky officially became a state on June 1, 1792, thus succeeding under the

Virginia-Kentucky Compact to all the rights of Virginia, whatsoever those rights might be, with respect to ownership and possession of the Ohio River.

Ohio, as Indiana,[2] received its territory from the United States. On August 7, 1789, Congress passed "an Act to provide for the Government of the Territory Northwest of the river Ohio." 1 Stat. 50. In 1800, this territory was divided into two separate governments. 2 Stat. 58. And on April 30, 1802, the enabling Act for the admission of Ohio was passed. 2 Stat. 173. Ohio was thus formed out of the eastern half of the previously divided territory and was "bounded . . . on the South by the Ohio River." The land in the eastern division not included within the boundaries described for Ohio was "attached to, and made a part of the Indiana territory." *Id.*, at 174.

The Commonwealth of Kentucky has always claimed and now claims that the boundary between it and the State of Ohio is the present low water mark on the northerly side of the Ohio River, wherever that may be from time to time subject to the natural processes of accretion and erosion. The State of Ohio, on the other hand, now claims that the boundary line between

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[2]Reference to Indiana is relevant and helpful in view of the previous decisions of this Court respecting the Kentucky-Indiana boundary along the Ohio River. On the 16th of April, 1816, Congress passed an Act to enable the people of the Indiana territory to form a state government, in which the boundaries of the proposed state were distinctly prescribed as provided under the Virginia Cession of 1784, and among them, that it should be bounded "on the south by the river Ohio, from the mouth of the Great Miami river to the mouth of the river Wabash." Indiana was admitted into the Union by a joint resolution of Congress, approved December 16, 1816, acquiring thereby no other or greater rights either as to soil or jurisdiction, than the United States had acquired under the Cession from Virginia.

it and Kentucky is the northerly low water mark of the Ohio River as that mark existed in the year 1792, when Kentucky was admitted into the Union.

ARGUMENT

I. THE NORTHERN BOUNDARY OF KENTUCKY ALONG THE OHIO RIVER IS THE NORTHERLY LOW WATER MARK AS IT PRESENTLY EXISTS AND AS IT MAY CHANGE THROUGH THE PROCESSES OF ACCRETION AND EROSION.

A.

The Report Is Erroneous in Concluding as a Matter of Law That the 1792 Low Water Mark on the Northerly Side of the Ohio River Is the Boundary Line Between Kentucky and Ohio.

The issue in this case is whether the boundary line between the two states is the northerly low water mark as it existed in 1792 (a static, inflexible and unchanging line) or the present low water mark (a natural and shifting line subject to accretion and erosion). By stipulation of the parties, the issue was submitted to the Special Master on briefs to determine whether it could be decided solely as a matter of law.

The Report completely ignores well-settled principles of law concerning river boundaries, established for centuries at common law and by longstanding decisions of this Court. It errs in concluding as a matter of law that what was intended as a natural river boundary was fixed in perpetuity as a specific line

formed by the precise location of the northerly river edge at its low water mark in 1792.

The Report fails to consider the traditional accretion-avulsion distinction which is critical in resolving river boundary disputes, including the present controversy. The failure to apply established Federal common law to this interstate boundary dispute is a fatal omission and this ground alone requires rejection of the Report.

From the days of the Romans to the present date, the rule adopted by virtually every system of jurisprudence[3] to determine boundaries formed by a body of water, whether public or private, is that the boundary will follow changes in the shoreline, unless those changes are sudden or avulsive. *Gould on Waters,* §155 (1883); I. Hyde, *International Law,* §138 (1945); 72 Am. Jur. 2d, *States, Territories & Dependencies,* §§27, 28. This rule has been recognized and repeatedly applied by this Court to determine interstate boundaries throughout the United States since our country's earliest days. *Arkansas* v. *Tennessee,* 397 U. S. 91 (1970); *Louisiana* v. *Mississippi,* 282 U. S. 458 (1931); *Oklahoma* v. *Texas,* 268 U. S. 252 (1925); *Arkansas* v. *Mississippi,* 252 U. S. 344 (1920); *Arkansas* v. *Mississippi,* 250 U. S. 39 (1919); *Missouri* v. *Nebraska,* 196 U. S. 23 (1904); *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918); *Nebraska* v. *Iowa,* 143 U. S. 359 (1892); *Iowa* v. *Illinois,* 147 U. S. 1 (1893); *Missouri* v. *Kentucky,* 78 U. S. 395 (1871).

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[3] *Nebraska* v. *Iowa,* 143 U. S. 359, 364 (1892).

A closer examination of a few of these cases reveals that the federal rule is and always has been in accord with the traditional accretion doctrine. The rule was clearly set out by this Court in *New Orleans* v. *United States,* 35 U. S. (10 Pet.) 662 (1836). In that case this Court held that:

> [t]he question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain. . . . 35 U. S. at 717.

This rule was the basis of the decision in *Missouri* v. *Nebraska,* 196 U. S. 23 (1904), an original suit brought by Missouri to establish the boundary between the two states along the Missouri River. Under the terms of its admission to the Union on March 6, 1820, Missouri's western boundary was established as "the middle of the Mississippi." The dispute in that case involved a piece of land called McKissick's Island. This "island" had formerly been a part of the Nebraska Territory mainland but within a twenty-four hour period had been cut off from that mainland by a sudden change in the course of the Missouri River. The dispute between Missouri and Nebraska was whether this change, which left the island on the Missouri side

of the river, affected the boundary between the two states. This Court discussed the general rule of accretion-avulsion and applied it to the facts at hand:

> We perceive no reason to believe that Congress intended, either by the facts of 1820 and 1836 relating to Missouri, or the act admitting Nebraska into the Union, to alter the recognized rules of law which fix the rights of parties where a river changes its course by gradual, insensible accretions, or the rules that obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed. 196 U. S. at 37.

The rule was again applied by this Court in *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918). Under the terms of the Treaty of 1763 between England, France and Spain, the boundary between France and Great Britain was established as "a line drawn along the middle of the River Mississippi." After the Revolutionary War the State of North Carolina succeeded to the rights of Great Britain to the territory east of the Mississippi and adjacent to the State of North Carolina. North Carolina then ceded to the United States in 1790 the area now comprising the State of Tennessee. Thus, Tennessee then succeeded on its admission to the Union to a boundary established as the middle of the Mississippi River. The disputes before this Court were whether an avulsive change could alter the boundary between the states of Arkansas and Tennessee and whether the middle of the river meant a point equi-

distant from each bank or a point in the middle of the navigable channel.

Applying the traditional doctrine this Court found that:

> [i]t is settled beyond the possibility of dispute that where running streams are the boundaries between states, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. 246 U. S. at 173.

The Court continued:

> The true boundary line between the states, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783 [8 Stat. at L. 80], subject to such changes as have occurred since that time through natural and gradual processes. 246 U. S. at 177.

The federal rule was recently reaffirmed in *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973), in which this Court found that "[r]iparian land is at the mercy

of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control." *Id.* at 326.

B.

The Report Errs in Failing to Consider the Critical Distinction Between Accretion and Avulsion.

It is clear that under the traditional accretion rule as applied by this Court the river boundary between Kentucky and Ohio is a wandering boundary, not an unswerving line, and when through the natural and gradual processes of erosion or accretion, the low-water mark is changed, the boundary follows the change. Therefore, the boundary between the two states will not become fixed and unchanging unless there has been an avulsive change in some part of the Ohio River which results in exposure of dry land where a line must be fixed as on any other land boundary.

Generally speaking, an avulsion occurs when there has been some violent and sudden change in the bed of a river:

> But if the change is violent and visible and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates. *Gould on Waters,* §159.

Thus, an avulsion could occur in two situations: (1) where the main channel of a river shifts abruptly from

one location to another, or (2) when an identified, stable land area finds itself on the "other" side of what would normally be the boundary. The so-called "island rule.")

For example, in the case of *Nebraska* v. *Iowa,* 143 U. S. 359 (1892), the Court was faced with a dispute arising out of a change in the Missouri River wherein the river suddenly cut through the neck of the ox-bow and created a new channel. This Court held that this change in the channel constituted an avulsion and thus the old boundary remained intact, stating:

> With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in the process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable, in the successive moments of its progression.
>
> But, on the other hand, if, deserting its original bed, the river forces for itself a new channel, in another direction, then the nation, through whose territory the river thus breaks its way, suffers

> injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. 143 U. S. at 36 L. Ed. 186, 188.

In *Missouri* v. *Kentucky,* 78 U. S. 395 (1871), the same principles were applied in determining whether the main channel of the Mississippi River had always flowed to the east or the west of Wolf Island. The Court found that the river had always flowed to the west of the island in the past and had then changed its channel so that the river flowed to the east of the island, and thus determined that the present change was avulsive in nature. The change did not therefore disturb the boundary between the two states and the island remained, as always, a part of Kentucky.

It is clear, then, that the boundary between Kentucky and Ohio is the *present* northerly low-water mark of the Ohio River and is an unchanging and fixed boundary only with respect to those areas in which an avulsive change has occurred.

C.

The Report Disregards the Clear Intention of Virginia, Manifested by This Court's Decision in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), to Retain the River as a Natural Boundary Subject to the Principles of Accretion and Erosion.

The Ohio River is a natural, everchanging boundary, subject to the federal common law principles of accretion and erosion.

Not only did the Report ignore well-established principles of law, which this Court has constantly followed in disputes of this nature, but failed to recognize the clearly stated intention of Virginia, in retaining the river as its northerly boundary, to establish the river as a natural and everchanging boundary. Kentucky's boundary on the Ohio River is clearly a boundary to which this rule of federal common law would apply.

When Virginia retained the river as its boundary between the District of Kentucky and the wilderness territory north of the river, she certainly did not intend that the low-water line be indelibly etched in the bed of the river. The Cession of Virginia contained no such provision. Such intention must be affirmatively set forth in the grant and cannot be implied where the grant is silent. *Leo Sheep Co.* v. *United States,* No. 77-1686 (Decided March 27, 1979). A static boundary would have served no purpose. There was no need for a static and fixed line. The river itself marked the outer limits of territory retained by Virginia in its cession to the United States and marked the beginning of the frontier lands which were later to be formed into states.

The river served as a natural boundary and Virginia obviously retained it for that purpose. In addition, the river had great value for navigational and fishing purposes and served as a natural protective barrier from the unsettled wilderness north of the river.

This Court in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), clearly recognized Virginia's intention to retain the river as a natural boundary.

Handly involved an action for ejectment brought by a plaintiff claiming under a grant from Kentucky against defendants claiming under a grant from the United States, as being part of Indiana. The dispute was over a neck of land which was separated from the mainland of Indiana by a channel or bayou which had formed north of the main river. When the river was high, the bayou or channel filled and the land was cut off from Indiana. When the water was low, the channel was dry in part and formed a peninsula. The resolution of the dispute depended upon whether the land was in Indiana or Kentucky. The Court stated that the answer to this question depended chiefly on the land law of Virginia, and on the cession made by that State to the United States.

In *Handly, supra,* at page 379, the Court stated:

> In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying, and being, to the north-west of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent states. *These states, then, are to have the river itself, wherever that may be, for their boundary.* This is a *natural boundary,* and in establishing it, Virginia must have had in view the *convenience of the future population of the country.*
>
> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting

> it, each holds to the middle of the stream. *But when as in this case, one state is the original proprietor, and grants the territory to one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary.* . . .
>
> . . . Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark (pp. 380, 381). (Emphasis added.)

When a river is a boundary between two States, it is a natural boundary subject to gradual changes in the course of the river caused by accretion and erosion. This is the general rule and the rule recognized by this Court in *Handly,* in construing Kentucky's boundary on the Ohio. Citing the French civil authority Vattel, the Court stated:

> "In case of doubt," says Vattel, "every country lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."
>
> "If," says the same author, "the country which borders on a river has no other limits than the river itself, *it is in the number of territories that have natural or undetermined limits, and enjoys the right of alluvion.*" 18 U. S. at 379, 380 (Footnote omitted, Emphasis added.)

Furthermore, since the river was a natural boundary subject to the right of alluvion, the Court in *Handly* recognized that the states bounded thereby would be affected by accretion:

> Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed and land formed by the receding of the water. 18 U. S. at 380.

Thus, this Court has clearly ruled that when Virginia ceded the lands northwest of the river to the United States and made the river itself the boundary, she intended that boundary to be a natural, shifting and indeterminate line, subject to the forces of accretion and erosion.

D.

The Report Incorrectly Holds That *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), Is Controlling on the Issue in This Case.

The Report concludes that this Court's decisions in *Handly's Lessee* v. *Anthony*, 18 U. S. (5 Wheat.) 374 (1820), and *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), control this case and support the finding that the boundary is the low-water mark of 1792. To the contrary, *Handly* supports Kentucky's position that the river is a natural boundary, subject to the forces of accretion and erosion and that the boundary between the two states is the present low-water mark.

Indiana v. *Kentucky, supra,* is not determinative because it involved an avulsive change around a small segment of the river and not a determination of the entire boundary.

The dispute in *Indiana* v. *Kentucky,* arose over Green River Island, which at one time had been a true island, separated from the Indiana mainland by the channel of the Ohio River. The river gradually began to change its course so that the main channel flowed to the south of the island. The old channel bed gradually filled up and the island became attached to the Indiana mainland. Nevertheless, the Court found that the island still lay within the boundaries of Kentucky since the change in the Ohio River around the island had been an avulsive change, *i.e.,* a change in the bed or main channel of the river itself. The Court then had to determine as of what date the boundary should be fixed with respect to this area. The application of the avulsion exception or the so-called "island" rule was the only issue before the Court in this case. It would be improper and misleading to cite that case for any thing else. The highest court in Kentucky expressly recognized that the *Indiana* v. *Kentucky* case limited to its facts because it involved an application of the avulsion exception to the general rule. *Vaughn* v. *Foster,* 20 Ky. L. R. 682, 47 S. W. 333 (1898).

Generally, boundaries fixed from an avulsion are determined as of the day before the avulsion. However, in *Indiana* v. *Kentucky,* the change was a long time in coming and no one could determine precisely *when* the avulsion was complete. All that could be determined

was that the old channel had changed its course sometime during the period after Kentucky became a state in 1792 and before Indiana was admitted to statehood in 1816. Although the Court was not explicit in why it chose the date it did, it is clear that *some* choice had to be made which would not abnegate the rights of Kentucky. Thus, the 1792 date was the logical choice, for to choose the 1816 date would have deprived Kentucky of *any* rights to Green River Island, for at that time the Ohio was flowing to the south of the island:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana . . . . Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river. 136 U. S. at 508.

It is indisputable that under this traditional analysis the boundary between the states of Kentucky and Ohio cannot be the 1792 northerly low-water mark unless some avulsion has occurred which has affected

the *entire* course of the Ohio River. That is, unless the entire Ohio River has at some point changed its channel for a new and different one, the boundary between the two states follows the present day course of the river. And if such a dramatic event had at some point occurred, it is equally indisputable that some recordation of it would have been made. Kentucky has been unable to find any such record, nor does Ohio claim such occurred.

The only relevance of the 1792 line is that it was the boundary at the time Kentucky was admitted to the Union. In the absence of proof of an avulsive change (like Green River Island) at some point along the Ohio River the current northern low water mark of the river is the boundary between Kentucky and Ohio, subject to subsequent accretive changes.

E.

The Law of Accretion and Erosion Is Applied to Rivers Which Are Natural Boundaries as a Rule of Convenience.

There is a very sound and pragmatic basis for the application of the well-recognized rules of law affecting river boundaries. There are compelling reasons why a fixed line should not be adopted as the boundary between the two states. A static 1792 boundary line would be impossible to determine and impracticable to administer. It is a well known fact that the 1792 boundary line has been obscured over the passage of time. It would be unrealistic to attempt to fix a line as it *might* have existed in that year. Furthermore,

there is no rational basis to choose a 1792 boundary. Kentucky was admitted into the Union in 1792 with her 1789 boundaries. Surely if one were choosing a fixed line that had some reasonable relationship with the state involved, one would choose a date as of which a state's boundary was defined, not what that boundary was three years later. Or why not choose a 1784 boundary line? That was the date when Virginia ceded her land to the Union, so what were ultimately the boundaries of Kentucky were established at that point. Or why not use the north low water mark of the river as it existed in 1802 when Ohio was admitted to the Union? There is no logical reason to prefer one date over another; none of these ancient dates can possibly be correct, and especially not the 1792 date. The possibilities are numerous and absurd.

It was just such confusion that persuaded the Court to adopt the long-accepted traditional rule of accretion/erosion. As Chief Justice Marshall repeatedly emphasized in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), a rule of convenience *must* exist; otherwise, confusion reigns supreme. The Chief Justice mentions this rule of convenience not fewer than four times:

> This is a natural boundary, and in establishing it, Virginia must have had in view the *convenience* of the future population of the country. 18 U. S. at 379. (Emphasis supplied.)
>
> This rule [the rule of accretion/erosion] has been established by the common consent of mankind. It is founded on common *convenience.* Even when a state retains its dominion over a river

which constitutes the boundary between itself and another state, it would be extremely *inconvenient* to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this *inconvenience* is not less where the rising and falling is annual, than where it is diurnal. 18 U. S. at 380. (Emphasis supplied.)

All the *inconvenience* which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the states on its southeastern side, would result from attaching to Kentucky, the state on its southeastern border, a body of land lying northwest of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above the low water mark. 18 U. S. at 381. (Emphasis supplied.)

It would be as *inconvenient* to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last mentioned state, as it would be for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the state on the opposite shore. 18 U. S. at 383 (Emphasis supplied.)

Thus, the rule of convenience serves both the policies of encouragement or readily ascertainable boundaries and discouragement of boundary disputes and litigation. *See Purvine* v. *Hathaway,* 238 Ore. 60, 393 P. 2d 181 (1964).

F.

The Erection of Artificial Structures Including Locks and Dams Does Not Constitute an Avulsion and Does Not Alter Application of Principles of Accretion and Erosion.

The State of Ohio claims the construction of locks and dams along the Ohio River has caused a general increase in the level of the river and that this rise in the water level with its corresponding inundation of greater areas requires fixing of the boundary at the 1792 low water mark.[4] While Kentucky has acknowledged the possibility of changes in the width of the Ohio River caused by locks and dams, it has denied that such changes, if any, can now be located or that they were appreciable. There is nothing in the record to support any findings as to the nature or extent of any changes caused by the dams. However, even assuming an increase in the water level, it has long been established

---

[4]Kentucky denies this. In its answer before this Court Kentucky stated that:

> 3. Admits the allegation in paragraph 9 that the original dams and the new dams caused the waters of the Ohio River to rise and admits that in some places along the river the effect of this *may* have been to cover portions of the northerly shore, but Defendant does not have sufficient knowledge or information to form a belief as to the extent of any such inundation and denies that the dams caused the shores or banks of the river to be moved farther northerly to any appreciable extent, and denies that any such effect was manifested at all places along the river between the State of Ohio and Kentucky. [Emphasis supplied.]
>
> 4. Admits that the 1792 north low water mark has been obscured, and no one knows or can ascertain by any means where the line would run today, but denies that this situation was caused by and has existed only since the increase in elevation of the water levels due to erection of dams from 1910 to date.

that the mere fact that a change in the high-water mark of a river boundary has been brought about by artificial rather than natural means does not mean that that change is avulsive rather than accretive/erosive. Rather, the same basic test is used to determine if an avulsion has occurred, *i.e.,* whether the river has changed its channel. This is the rule which has been adopted by the federal courts.

The erecting of artificial structures, such as the dams and locks, does not alter the application of the accretion doctrine. *County of St. Clair* v. *Lovingston,* 90 U. S. (23 Wall.) 46, 50-66 (1874). unless, perhaps structures are erected for the specific purpose of causing the accretion. *Beaver* v. *United States,* 350 F. 2d 4 (9th Cir. 1965). *cert. denied,* 383 U. S. 937 (1966). *Accord, United States* v. *Claridge,* 416 F. 2d 933 (9th Cir. 1969), *cert. denied,* 397 U. S. 961 (1970); *Pollard's Lessee* v. *Hagan,* 44 U. S. 212 (1845); *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973).

For example, in *Bonelli, supra,* a dispute arose between the Bonelli Cattle Company and the State of Arizona over lands which had surfaced when the Colorado River withdrew as a result of federal rechannelling project. This Court applied federal common law to the situation and determined that the fact that the change came about through artificial means should have no effect on the outcome:

> The doctrine of accretion applies to changes in the river course due to artificial as well as natural causes. *County of St. Clair* v. *Lovingston, supra,* at 64-69, 23 L. Ed. 59 (1874); *United States* v.

> *Claridge,* 416 F. 2d 933 (CA9 1969), cert. denied, 397 U. S. 961, 25 L. Ed. 2d 253, 90 S. Ct. 994 (1970) (changes in the Colorado River's course, caused by the construction of Hoover Dam, are accretive). Where accretions to reparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof. 414 U. S. at 327.

Since the channelling was not avulsive (because the river had not changed its bed), the land in question belonged to the individual landowner. The determination that the changes in the Colorado River caused by the erection of the Hoover Dam, one of the most massive structures on earth, were accretive, was made on a full factual record. The Special Master here made his findings that the small dams on the Ohio were avulsive in nature on a record barren of facts. Certainly if it requires a full evidentiary hearing to determine the nature of the changes caused by Hoover Dam no less is necessary in this case.

Bonnelli relied upon the result and analysis in *United States* v. *Claridge,* which rejected the substantial changes wrought by construction of Hoover Dam as being avulsive and held such change to be accretive.

The *Bonelli* case has since been modified on the basis that it applied federal common law to a situation involving a river which was wholly *intra*state. *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U. S. 363 (1977). The *Corvallis* case, though, made it explicit that federal common law still applies in the case of an *inter*state boundary:

> If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. 429 U. S. at 375.

An application of the federal rule to the facts at hand can lead to only one conclusion—in the absence of affirmative proof to the contrary, no avulsion has occurred as a result of the construction by the federal government of the locks and dams on the Ohio River. The river has not, as a result of that construction, abandoned its old bed and sought a new one. A mere increase in the volume of water is not an avulsion and does not invoke the principles governing avulsion. *Purvine* v. *Hathaway,* 238 Ore. 60, 393 P. 2d 181 (1964).

In the *Purvine* case, the court dealt with a change in the Willamette River. The Willamette had earlier consisted of two branches joined by a body of water known as Hogue Creek. During a storm the east branch of the Willamette was almost entirely rechannelled into Hogue Creek. The east branch gradually dried up and Hogue Creek became the main branch of the Willamette River. It was obvious that the change to the east branch had been avulsive in nature; however, the issue before the court was whether the sudden increase in the size of Hogue Creek was avulsive. The plaintiffs were alleging that the change was avulsive and that the boundary between them and the defendant remained fixed as of the date of the storm. The court rejected this argument saying:

> But the principle of avulsion has not, as far as we have been able to ascertain, ever been applied when the sole change in the course of the stream involves simply an extension of its banks by the sudden influx of water. 393 P. 2d at 183.

The same general principles should likewise apply in the instant case. The dams along the Ohio were constructed by the federal government, not by the Commonwealth of Kentucky and certainly not for the purpose of encroachment upon Ohio territory. Their construction generated no change in the course of the Ohio River; no land masses were forcibly transferred from one side of the river to the other, nor did the river suddenly leave its bed. All that occurred was a mere increase in the volume of the water in the Ohio, and even that increase was neither sudden nor dramatic. In short, there is no authority under which construction of locks and dams on the Ohio can remove this case from the operation of the general rules of accretion and erosion.

II. LEGISLATIVE ACTS CONCLUSIVELY DEMONSTRATE THAT THE BOUNDARY BETWEEN KENTUCKY AND INDIANA IS THE CURRENT LOW WATER MARK ON THE NORTHERN SIDE OF THE OHIO RIVER; OHIO'S CLAIM, BASED ENTIRELY ON THE STATUS OF KENTUCKY'S BOUNDARY WITH INDIANA, MUST BE REJECTED AS A MATTER OF LAW.

The Report in its second part (pages 12-16) concludes that application of the principles of acquiescence and prescription bars Kentucky's claim that its north-

ern boundary is the current low water mark on the northerly side of the Ohio River as it exists at any given time. The Report bases this conclusion entirely on an isolated statement taken from a research "Informational Bulletin" prepared by the Kentucky Legislative Research Commission, a service agency for the Kentucky General Assembly, and on statements in an advisory opinion of an assistant attorney general of Kentucky. This conclusion must be rejected as a matter of law because public legislative acts of Indiana and Kentucky, approved by the Congress of the United States, conclusively establish the current low water mark on the northerly side of the Ohio River, as it exists at any given time, as the entire boundary between Indiana and Kentucky, with the exception of the Green River Island area where, due to avulsion, a channel filled up, and the boundary was surveyed and marked on dry ground.[5]

In March, 1942, the General Assembly of Kentucky adopted an act to establish the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement, 1942 Ky. Acts, Chapter 116. (Appendix to this brief, hereinafter appendix, pp. 35-36). The act recited that neither of the terminal points of

[5]It is difficult to conceive how the statements of individuals, even officers or employees of the State, in the documents referred to, could be valid evidence of acquiescence by the sovereign Commonwealth of Kentucky, especially on a stipulated submission on the pleadings solely on a question of law and without evidence. However, since the statements could not possibly effect the public acts of the two states which conclusively establish their boundary with the approval of Congress, whether the statements would otherwise have any weight whatsoever is not involved and need not be considered in this case.

the boundary line described in the Green River Island case, *Indiana* v. *Kentucky,* 163 U. S. 520 (1896), "reached the *low water mark* of the right side of the Ohio River, *forming the remainder of the boundary line* between said States," that the Governors of the two states "have appointed Commissioners to study said question for the purpose of ascertaining the true and legal boundary line thus in dispute," and that "said Commissioners have agreed upon the true and legal boundary line." (Emphasis added.) The act then provided that upon "enactment of a similar and reciprocal law by the State of Indiana and the approval and consent of the Congress of the United States of America to the compact thereby effected, the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows". The act then described the two lines necessary to connect the two terminal points to the "low water mark" and completed the description of the Indiana-Kentucky boundary upstream with the language "to the low water mark on the right side of the Ohio River and thence upstream at low water mark on the right side of said River," and completed the description of the Indiana-Kentucky boundary downstream with the language "to the low water mark on the right side of the Ohio River and thence downstream with said low water mark on the right side of said River." The Indiana General Assembly passed a like act. 1943 Ind. Acts, Ch. 2. The Congress of the United States then passed a joint resolution in 1943 reciting the actions of the Governors and commissioners and the passage of the Kentucky Act in 1942 and the

Indiana Act in 1943, and approved the boundary line as described in the acts. 57 Stat. 248 (1943) (Appendix, pp. 37-39).

No reference to any time or specific location concerning the low water mark upstream or the low water mark downstream was made in these legislative acts of the states or joint resolution of Congress. It is thus beyond cavil that Indiana and Kentucky through their legislatures confirmed that their entire boundary, except for that portion fixed by survey at Green River Island, is the low water mark on the northern side of the Ohio River at any given time, as affected by the processes of accretion and erosion. Obviously, it must remain that way unless and until changed by another compact.

It follows that the recommendation in the Report of the Special Master, based on the Kentucky-Indiana boundary, that the Kentucky-Ohio boundary be determined as the low water mark on the northerly side of the Ohio River as it existed in the year 1792, must be rejected.

CONCLUSION

The sole issue before this Court is one of law and is by what legal standard is the Ohio River boundary between Ohio and Kentucky to be determined.

There is no factual record in this case and obviously no evidence of avulsive changes having taken place. Thus, the reliance in the Report on the opinion of this Court in *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), is misplaced because that opinion was the so-called Island or avulsion exception to the general rule set

forth above. See *Vaughn* v. *Foster,* 20 Ky. L. R. 682, 47 S. W. 333 (Ky. 1898). The Island Exception has no bearing upon a case such as this which seeks to fix a boundary several hundred miles in length on a river which has made no avulsive change in course. This Court should follow the age-old rule that when a river itself is the boundary between two states, the low-water mark on one side, as it may fluctuate from time to time by accretion and erosion, is the boundary. This Court should enter a decree that the boundary between Ohio and Kentucky is the present northerly low-water mark of the Ohio River as it may exist at any given time as affected by accretion and erosion.

Respectfully submitted,

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APPENDIX

APPENDIX

Kentucky Acts, 1942, Chapter 116:

AN ACT to establish the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement; to provide that the line so established shall become the boundary line upon the enactment of a similar and reciprocal law by the State of Indiana and the approval and consent to the compact thereby effected by the Congress of the United States of America.

WHEREAS, by decree of the Supreme Court of the United States in the case of Indiana v. Kentucky, decided May 18, 1896, and reported in 163 U. S. Reports the boundary line between the State of Indiana and the Commonwealth of Kentucky between certain terminal points therein described was fixed and established, and

WHEREAS, neither of said terminal points reached the low water mark of the right side of the Ohio River, forming the remainder of the boundary line between said States, and

WHEREAS, owing to the facts recited in the preceding literary paragraph hereof a dispute has arisen as to the boundary line connecting said terminal points with said low water mark, and

WHEREAS, the Governor of the State of Indiana and the Governor of the Commonwealth of Kentucky have appointed Commissioners to study said question for the purpose of ascertaining the true and legal boundry [sic] line thus in dispute, and

WHEREAS, said Commissioners have agreed upon the true and legal boundary line;

NOW THEREFORE,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That on and after the enactment of a similar and reciprocal law by the State of Indiana and the approval and consent of the Congress of the United States of America to the compact thereby effected, the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows, that is to say:

Commencing at a point on the line between Sections 15 and 14, Township 7 South, Range 10 West, and 67.25 chains South of the Northeast corner of Section 15, the same being the beginning point in the description of the part of the boundary line as fixed by the Supreme Court of the United States in Indiana v. Kentucky, decided May 18, 1896, and reported in 163 U. S. Reports thence south 0°, 53′ 15″ West to the low water mark on the right side of the Ohio River and thence upstream at low water mark on the right side of said River. Also beginning at the same beginning point to-wit: the beginning point in the description of the part of the boundary line between the State of Indiana and the Commonwealth of Kentucky as fixed by the Supreme Court in the cases above recited and following that line to the end of so much of said boundary line as was fixed by said decree; thence due West to the low water mark on the right side of the Ohio River and thence downstream with said low water mark on the right side of said River.

§ 2. Upon the enactment of a similar and reciprocal law by the State of Indiana, and the approval and consent of the Congress of the United States to the compact thereby effected, evidence thereof, together with the survey and report of the Commissioners by whom the boundary line was agreed upon, shall be filed in the office of the Secretary of State of Kentucky, and a copy thereof shall be filed in the office of the county court clerk of Henderson County, Kentucky.

Approved 9th March, 1942.

57 Stat. 248 (1943):

Joint Resolution giving the consent of the Congress to an agreement between the State of Indiana and the Commonwealth of Kentucky establishing a boundary between said State and said Commonwealth.

Whereas, by decree of the Supreme Court of the United States in the case of Indiana against Kentucky, decided May 18, 1896, and reported in 163 United States Reports, the boundary line between the State of Indiana and the Commonwealth of Kentucky between certain terminal points therein described was fixed and established; and

Whereas neither of said terminal points reached the low-water mark of the right side of the Ohio River forming the remainder of the boundary line between said State and said Commonwealth; and

Whereas, owing to the fact recited in the preceding literary paragraph hereof a dispute has arisen as to the boundary line connecting said terminal points with said low-water mark; and

Whereas the Governor of the State of Indiana and the Governor of the Commonwealth of Kentucky appointed commissioners to study said question for the purpose of ascertaining the true and legal boundary line thus in dispute; and

Whereas said commissioners agreed upon the true and legal boundary line; and

Whereas the General Assembly of the State of Indiana passed an act known and designated as Enrolled Act Number 19, House, bearing the signatures of Hobart Creighton, speaker of the house of representatives; Charles M. Dawson, president of the senate; and the signature and approval of Henry F. Schricker, Governor of Indiana, under date of January 29, 1943; and

Whereas the General Assembly of the Commonwealth of Kentucky passed a like act known and designated as House

Bill Numbered 375, bearing the signatures of Stanley S. Dickson, speaker of the house of representatives; Rodes K. Myers, president of the senate; and the signature and approval of Keen Johnson, Governor of Kentucky, under date of March 9, 1942; and

Whereas the said acts provided in substance that upon the approval and consent of the Congress of the United States the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows:

Commencing at a point on the line between sections 15 and 14, township 7 south, range 10 west, and sixty-seven and twenty-five one-hundredths chains south of the northeast corner of section 15, the same being the beginning point in the description of the part of the boundary line as fixed by the Supreme Court of the United States in Indiana against Kentucky, decided May 18, 1896, and reported in 163 United States Reports; thence south no degrees fifty-three minutes fifteen second west to the low-water mark on the right side of the Ohio River and thence upstream at low-water mark on the right side of said river. Also beginning at the same beginning point, to wit: The beginning point in the description of the part of the boundary line between the State of Indiana and the Commonwealth of Kentucky as fixed by the Supreme Court in the case above recited and following that line to the end of so much of said boundary line as was fixed by said decree; thence due west to the low-water mark on the right side of the Ohio River and thence downstream with said low-water mark on the right side of said river; and

Whereas the said acts of the State of Indiana and the Commonwealth of Kentucky constitute an agreement between said State and said Commonwealth establishing a boundary line between said State and said Commonwealth: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.

That the consent of the Congress is hereby given to such agreement and to the establishment of such boundary, and said acts of the State of Indiana and the Commonwealth of Kentucky are hereby approved.

Approved June 29, 1943.

IN THE

UNITED STATES SUPREME COURT

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Defendant.*

CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for defendant, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of April, 1979, I served three copies of the foregoing Exceptions of the Commonwealth of Kentucky to the Report of the Special Master filed January 22, 1979 and Brief in Support of Exceptions, by first class mail, postage prepaid, on the plaintiff, the State of Ohio, addressed to counsel for plaintiff, Honorable Michael R. Szolosi, 1st Asst. Atty. Gen., 30 E. Broad St., Columbus, Ohio 43215.

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Supreme Court, U. S.
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No. 27, Original

In The

Supreme Court of the United States

October Term, 1978

STATE OF OHIO,
Plaintiff

v.

COMMONWEALTH OF KENTUCKY,
Defendant

REPLY BRIEF OF THE STATE OF OHIO TO THE EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE SPECIAL MASTER'S REPORT

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REPLY BRIEF OF THE STATE OF OHIO TO THE EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE SPECIAL MASTER'S REPORT

INTRODUCTION

On January 22, 1979, Judge Robert Van Pelt[1], the Special Master appointed in this case, submitted his Report and Recommendations to the Court. On the same date, the Report was received and ordered filed by the Court. The Court further ordered that exceptions to the Report be filed by the parties within forty-five days and reply briefs within thirty days. By subsequent Orders, the Court extended the time to file exceptions to the Re-

[1] The Honorable Phillip Forman was the first Special Master appointed in this case. 385 U.S. 803 (1966). In 1977, Judge Forman submitted his resignation and was succeeded as Special Master on July 28, 1978, by Judge Van Pelt. Any reference to Report in this brief is limited to the Report filed by Judge Van Pelt on January 22, 1979, unless otherwise indicated.

port to April 6, 1979, and the time to file reply briefs to June 6, 1979. Exceptions to the Report were filed by the Commonwealth of Kentucky on April 6, 1979.

QUESTION PRESENTED

Whether the Court should adopt the conclusion and recommendation of the Special Master that the boundary between Kentucky and Ohio is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792?

STATEMENT OF THE CASE

This original action was initiated in March, 1966, when the State of Ohio filed a complaint in this Court to determine the location of its boundary with the Commonwealth of Kentucky. Leave to file the bill of complaint was granted. 384 U.S. 982 (1966). In its complaint Ohio alleged that the boundary line between the two states lies at the low-water mark on the northerly side of the Ohio River as it existed in 1792 when Kentucky became a state. In its answer Kentucky alleged that the boundary is an ever-changing line determined by reference to the present day low-water mark on the northerly shore.

On August 30, 1971, Ohio sought leave in this Court to file an amended complaint in which it claimed the middle of the Ohio River as the boundary between Ohio and Kentucky. The Court referred the motion to its Special Master and on April 10, 1972, Judge Forman submitted his Report in which he recommended that the Court deny Ohio's petition to amend its complaint. Oral argument was held on January 10, 1973. The motion for leave to amend was denied and the case was remanded

to the Special Master for further proceedings. 410 U.S. 641 (1973).

Following remand, the parties entered into a stipulation in which they agreed that the boundary line question could be determined as a matter of law without the necessity of further factual development and further agreed to submit that question to the Special Master on briefs. Report, Appendix A, Item 3.[2]

In his Report of January 22, 1979, the Special Master delineated the sole issue now before the Court, pursuant to the stipulation between Ohio and Kentucky, as follows:

THE SOLE ISSUE

> Judge Forman's papers indicate that he had concluded under the stipulation that there was submitted to him this question:
>
> Whether the boundary line between Kentucky and Ohio is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 or the low-water mark on the northerly side of the river as it exists today? I agree with this statement of the issue and will confine this report to that issue only.
>
> Report, at 5.

With respect to that issue, the Special Master concluded:

> that Ohio's claim is correct and that the boun-

[2] Ohio agrees with Kentucky that the second issue raised by the pleadings, the concurrent jurisdiction of the states over the Ohio River, has not been presented to the Special Master and is not now before the Court. Kentucky's Brief, p. 4.

> dary between the State of Ohio and the Commonwealth of Kentucky under the prior decisions of this Court is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and not the low-water mark on the northerly side as it exists today.
>
> Report, at 16.

The Special Master's conclusion is fully supported by the prior decisions of this Court. Accordingly, the State of Ohio urges the Court to adopt the recommendations of the Special Master as set forth in his Report.

STATEMENT OF FACTS

The facts which are relevant to the issue now before the Court are fully set forth in this Court's prior decision in this case, *Ohio v. Kentucky*, 410 U.S. 641, 641-644; The Report of the Special Master at pp. 3-4; and Kentucky's Brief at pp. 5-7.[3]

ARGUMENT

I. THE REPORT OF THE SPECIAL MASTER PROPERLY CONCLUDED THAT THE BOUNDARY BETWEEN THE STATE OF OHIO AND THE COMMONWEALTH OF KENTUCKY IS THE LOW-WATER MARK ON THE NORTHERLY

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[3] Ohio agrees with the historical background set forth in Kentucky's Brief at pp. 5-7 except for the concluding paragraph which asserts that Kentucky has always claimed the present day low-water mark on the northerly side of the Ohio River as its boundary with Ohio.

SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR 1792.

As noted above, the Special Master concluded in his Report that the boundary between Ohio and Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792. Based upon that conclusion, the Special Master recommended to this Court:

> That the Supreme Court of the United States determine that the boundary between the State of Ohio and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and that said boundary is not the low-water mark on the northerly side of the Ohio River as it exists today.
>
> Report, at 16.

In reaching his conclusion and recommendation, the Special Master relied principally upon and followed the prior decision of this Court in *Indiana v. Kentucky*, 136 U.S. 479 (1890). As discussed below, this Court's decision in *Indiana v. Kentucky* is determinative of the issue in this case and fully supports the conclusion and recommendation of the Special Master.

A. THIS COURT'S DECISION IN *INDIANA V. KENTUCKY*, 136 U.S. 479 (1890), IS DETERMINATIVE OF THE ISSUE IN THIS CASE.

In *Indiana v. Kentucky*, the Court was asked to resolve a dispute between those states over their proper boundary line along the Ohio River and in particular to determine the ownership of a tract of land attached to Indiana but known as Green River Island. Kentucky based its claim

to Green River Island, *inter alia,* on the ground that at the time she became a state, June 1, 1792, this tract of land was an island in the Ohio River and that, on that date, Kentucky's boundary extended to the low-water mark on the north side of the river. *Id.* at 503. Indiana, on the other hand, argued that upon her admission to the Union in 1816 her southern boundary was designated as the Ohio River and that, on her date of admission, the Ohio River ran south of Green River Island and a mere bayou separated it from the mainland.

In reaching its decision, the Court in *Indiana v. Kentucky* first reviewed the history of the 1784 cession by Virginia of its territory lying north and west of the Ohio River. This history is thoroughly reviewed not only in *Indiana v. Kentucky* but also in this Court's prior decision in this case, *Ohio v. Kentucky,* 410 U.S. 641, 645-47 (1973); the Report of the Special Master at pp. 7-9; and the Brief in Support of Kentucky's Exceptions to the Special Master's Report at pp. 5-7. As a result, Ohio will not repeat the history of the Virginia cession except to cite the operative language of the deed of cession executed by the delegates of Virginia which provided:

> by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefit of the said States, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory of tract of country within the limits of the Virginia charter, situate, lying, and being, to the northwest of the river Ohio . . .
>
> 1 Laws of the United States 472, 474 (1784).

The Court next reviewed its decision in *Handly's*

Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820), which as discussed in more detail *infra*, held that the boundary between Indiana and Kentucky as a result of the cession by Virginia was the low-water mark on the northwest side of the river. Thus, the Court in *Indiana v. Kentucky* phrased the controlling principle in determining the ownership of Green River Island as follows:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extendeed at that time to low water-mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.
>
> *Indiana v. Kentucky* at 508.

The Court went on to find that the low-water mark of the Ohio River was north of Green River Island when

Kentucky became a state and further held that Kentucky's title to the land was buttressed by Indiana's long acquiescence in Kentucky's exercise of dominion and sovereignty over it. *Id.* at 509-510.

The Special Master correctly held that the principles set forth in *Indiana v. Kentucky* were determinative of the issue in this case because Ohio, like Indiana, was formed out of land ceded by Virginia to the United States in 1784. Report at 7 and 12. Specifically, the Special Master concluded:

> Your Special Master believes that *Indiana v. Kentucky, supra,* answers Kentucky's arguments in this case in three sentences above quoted.
>
> > She [Kentucky] succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky,* 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.
>
> *Id.* at 508.

> Thus, this Court long ago invalidated Kentucky's present contentions. Your Special Master concludes that the decisions in *Indiana v. Kentucky, supra,* and *Handly's Lessee, supra,* control this case.
>
> Report at 12.

The arguments now presented to the Court by Kentucky in support of its exceptions to the Special Master's Report are essentially those presented to the Special Master, and similarly should be rejected by this Court.

B. KENTUCKY'S ATTEMPTS TO DISTINGUISH THIS CASE FROM THE DECISION IN *INDIANA V. KENTUCKY* ARE WITHOUT MERIT.

Kentucky unsuccessfully attempts to distinguish this case from the Court's decision in *Indiana v. Kentucky* by arguing that that case involved an avulsive change in the Ohio River. Kentucky's Brief at 20. A review of the decision in *Indiana v. Kentucky* fails to reveal, however, any discussion of avulsion or any finding of an avulsive change in the river. Rather, the Court properly determined that the boundary between Indiana and Kentucky was fixed when Kentucky was admitted to the Union in 1792:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended *at that time* to low-water mark on the northwest side of the river. She succeeded to the ancient right and

> possession of Virginia, and *they could not be affected by any subsequent change* of the Ohio River . . .
>
> 136 U.S. at 508 (emphasis added).

Indeed, the language used by the Court in *Indiana v. Kentucky* is squarely contrary to the application of traditional common-law principles of avulsion, accretion and erosion. These principles permit or deny changes in boundaries based upon changes in the course of a river and the characterization of those changes as either accretive-erosive or avulsive in nature. The Court in *Indiana v. Kentucky*, however, expressly held that such changes could not affect Kentucky's boundary with Indiana:

> Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, *unaffected by the action of the forces of nature upon the course of the river.*
>
> *Id.* (emphasis added).

Kentucky asserts in its Brief that the Court in *Indiana v. Kentucky* found:

> that (Green River Island) still lay within the boundaries of Kentucky *since the change in the Ohio River around the island had been an avulsive change* . . .
>
> Kentucky's Brief at 20. (emphasis added).

An examination of the opinion in *Indiana v. Kentucky* reveals, however, that the decision of the Court is barren of any such finding.

As Kentucky notes in its Brief, "an avulsion occurs when there has been some violent and sudden change in the bed of a river." Kentucky's Brief at 13. However,

Kentucky concedes in its Brief that the change in the Ohio River around Green River Island was a gradual change which occurred over a long period of time. Kentucky's Brief at 20-21. Any characterization of this gradual change as an avulsive change is Kentucky's, not the Court's.

As Kentucky further notes in its Brief, under the general principles of avulsion, a boundary line is fixed at its location immediately prior to the point in time when the avulsion occurred. Kentucky's Brief at 20. *See also, Arkansas v. Mississippi*, 250 U.S. 39, 45 (1919). In *Indiana v. Kentucky*, however, the Court did not direct that its commissioners determine the boundary line just prior to an avulsion because the Court never found that an avulsion had occurred. Rather, the Court directed its commissioners to ascertain the low-water mark on the north side of the Ohio River as it existed on the day Kentucky was admitted to the Union. *Id.* at 519. Kentucky incredibly asserts that "the Court was not explicit in why it chose the date it did . . .," Kentucky's Brief at 21, and then quotes the exact reason given by the Court:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land

> from the tract in controversy to the State of Indiana. . . . Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river. 136 U.S. at 508.
>
> Kentucky's Brief at 21.

Understandably Kentucky would prefer to distinguish or ignore the clear holding in *Indiana v. Kentucky*. However, any effort to distinguish that case on the grounds that it involved an avulsive change must fail in view of the total absence of any discussion of avulsion in the opinion of the Court, the conceded gradual change in the Ohio River near Green River Island and the clear language in the Court's opinion that the boundary was fixed at the time Kentucky was admitted to the Union "unaffected by the action of the forces of nature upon the course of the river."

C. *INDIANA V. KENTUCKY* WAS DECIDED WITHOUT REFERENCE TO TRADITIONAL PRINCIPLES OF ACCRETION AND AVULSION.

The Court in *Indiana v. Kentucky* recognized that the proper interpretation of the deed of cession executed by Virginia in 1784 was the controlling issue in that case, rather than the application of traditional common-law principles of accretion and avulsion. For example, the Court began its analysis of the opposing positions as follows:

> As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry, therefore, is as to what line

> on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river.
>
> *Id.* at 505.

It was in this context that the Court considered the decision in *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820).

Handly's Lessee v. Anthony was an ejectment action in which the plaintiff claimed land under a grant from the state of Kentucky while the defendant held the land under a grant from the United States, as being part of Indiana. The title to the land thus depended upon whether the land was situated in the state of Indiana or the state of Kentucky. The Court determined that the answer to that question depended upon the proper interpretation of the cession made by Virginia to the United States.

The land in question was surrounded by water when the river was at its middle and usual state. When the river was at low-water mark, however, the land was connected on its northerly side to the state of Indiana. Thus the issue before the Court in *Handly's Lessee* was stated by Chief Justice Marshall as follows:

> The two exceptions present substantially the same questions to the Court, and may therefore be considered together. They are, whether land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low? and whether Kentucky was bounded on the west and northwest by the low-water mark of the river, or at its middle state? or, in other words, whether the State of Indiana extends to low-water mark, or stops

at the line reached by the river when at its medium height?

Id. at 378-79.

In resolving this issue, the Court placed heavy reliance on the inconvenience which would exist if the mid-level mark rather than the low-water mark was used as a boundary. *Id.* at 380-81. Contrary to Kentucky's present argument, the inconvenience referred to by the Chief Justice was not a matter of readily ascertaining a boundary. Rather the Court was concerned that a narrow strip of land under the jurisdiction of Kentucky would exist on the northern shore of the Ohio River during the period of time that the river flowed below its mid-level mark. Thus, the Court reasoned that the boundary of the state of Kentucky extends only to the low-water mark on the western or northwestern side of the Ohio River and does not extend to the river mark at its middle or usual state.

The Court in *Indiana v. Kentucky* recognized the decision in *Handly's Lessee* as having established that the boundary of Kentucky was the low-water mark on the northerly side of the river. The Court then proceeded to determine that the low-water mark referred to in *Handly's Lessee* was the low-water mark as it existed at the time Kentucky was admitted to the Union, "unaffected by the action of the forces of nature upon the course of the river." *Indiana v. Kentucky* at 508.

Kentucky argues that if Virginia intended that the low-water mark be permanently fixed as Kentucky's northern boundary, such an intention must be affirmatively set forth in the deed of cession and cannot be implied. Kentucky's Brief at 16, citing *Leo Sheep Co. v. United States*, —U.S.—, 99 S. Ct. 1403 (1979). The issue in *Leo Sheep* was

whether the United States had reserved an implied right of easement across land granted to the Union Pacific Railroad under the Union Pacific Act of 1862. This Court held that the common-law doctrine of easement by necessity was insufficient to overcome the inference prompted by the omission of any reference in the 1862 Act to such a right. In so deciding, the Court noted that although the 1862 Act specifically listed reservations to the grants, no reservation of a right of easement was contained in the Act.

Although the decision in *Leo Sheep* is distinguishable, the extent to which it serves as precedent in this case would appear to support Ohio's rather than Kentucky's claim. That is, the Court held in *Leo Sheep* that where the grantor makes specific reservations in transferring land, no further reservations will be easily implied. In the present case, when Virginia executed its deed ceding land north of the Ohio River to the United States, it did so:

> upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that the states so formed shall be distinct republican states, and admitted members of the federal union; having the same rights of sovereignty, freedom, and independence, as the other states.
>
> 1 Laws of the United States 472, 473 (1784).

In addition, the Act authorizing the conveyance to the United States also provided: that Virginia was to be reimbursed for any reasonable expenses incurred in maintaining garrisons and forts within the territory so ceded; that

French and Canadian citizens in the territory would have their possessions and titles confirmed to them; that a tract of land in the ceded territory would be reserved for soldiers who served with General George Rogers Clark in the Revolutionary War; and that if land reserved for Virginia troops in the Revolutionary War proved insufficient for their legal land bounties, the deficiency would be made up from land on the northwest side of the river. 1 Laws of the United States 472, 473-74 (1784).

In light of these reservations, it seems clear that if Virginia intended to retain for herself an ever-changing boundary, her deed of cession to the United States would have expressly provided what Kentucky now urges this Court to imply.

D. KENTUCKY'S CLAIM THAT A RULE OF CONVENIENCE REQUIRES AN EVER-CHANGING BOUNDARY IS ERRONEOUS.

As discussed above, in *Handly's Lessee v. Anthony, supra,* Chief Justice Marshall placed great weight on the inconvenience that would result from a boundary formed by the mid-level water mark rather than the low-water mark. In its brief, Kentucky mistakenly argues that the Chief Justice was referring to the rule of accretion/erosion in his discussion of a rule of convenience. Kentucky's Brief at 23. Rather than accretion and erosion, the Chief Justice was concerned with the rising and falling of the water level and "all the *inconvenience* which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side. . . ." *Handly's Lessee* at 381. (emphasis added).

Kentucky interprets the rule of convenience to mean a

rule which promotes readily ascertainable boundaries and discourages boundary disputes. From this premise, Kentucky argues that:

> There are compelling reasons why a fixed line should not be adopted as the boundary between the two states. A static 1792 boundary line would be impossible to determine and impracticable to administer. It is a well known fact that the 1792 boundary line has been obscured over the passage of time. It would be unrealistic to attempt to fix a line as it might have existed in that year.
>
> Kentucky's Brief at 22.

Kentucky's arguments on this score are defective for two principal reasons.

First, a static 1792 boundary line would be no more difficult to administer than would an ever-changing boundary line based upon the present day low-water mark. Kentucky seems to imply that use of a present day low-water mark permits one to physically observe the boundary between the two states at any given time. In other words, Kentucky seems to view the river as being like an ocean with a high tide and low tide on a regular basis.

The low-water mark of a fresh water river has been defined to mean the point to which a river recedes at its lowest stage. *Gould, Law of Waters* § 45, at 106 (3d Ed. 1900). Thus, for the greater part of the year, this mark will be obscured by the river's water while at its usual stage and rising to its high-water mark. Administration of laws based upon the present day low-water mark would thus require a survey and calculations to determine the

true boundary as would laws based upon the 1792 low-water mark.[4]

Kentucky further argues, however, without citation to authority or evidence that the 1792 low-water mark has been obscured by the passage of time and would be impossible to determine. Kentucky's Brief at 22. Kentucky's assertions on this point are simply wrong as is evident from the reported decisions of the Nuclear Regulatory Commission.

In *In the Matter of Public Service Company of Indiana, Inc.*, 8 NRC 253, (Atomic Safety & Licensing Board Docket Nos. STN 50-546, 50-547; Marble Hill Nuclear Generating Station, Units 1 and 2; Decision of August 30, 1978), the Atomic Safety and Licensing Appeal Board (ASLAB) was faced with a challenge by Kentucky to the issuance of a preliminary work permit for the construction of a nuclear generating plant at Marble Hill, a site in southern Indiana on the Ohio River. Kentucky's challenge was based upon its determination that section 401 of the Federal Water Pollution Control Act required a certification by Kentucky regarding any discharge

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[4] Although no evidence regarding the location of the present day or 1792 low-water mark has been taken by the Special Master, Ohio believes a serious question exists as to whether a present day low-water mark can even be determined along the Ohio River. The United States Corps of Engineers has constructed a series of dams at various points on the Ohio River in recent years. As a result of these dams, the water level of the Ohio River is subject to controlled alteration in order to alleviate flooding and drought conditions. The ability of the Corps of Engineers to artificially set or alter the water level of the river adds to the uncertainty of the location of the "present day" low-water mark.

which the plant might make into the Ohio River. Section 401 requires a certification from "the State in which the discharge originates or will originate . . ." 33 U.S.C. §1341 (a) (1).

The utility-owner of the proposed power plant had sought and received a Section 401 certification from Indiana, the state in which the plant would be located. The ASLAB, in an earlier opinion reported at 7 NRC 179, 189-93, had held that the Section 401 certification must come from the state into whose waters the effluent would be discharged. The ASLAB also had held that in making that determination, the Board was bound by the controlling decisions of this Court which placed the boundary at the low-water mark on the northern side of the river in 1792, citing *Indiana v. Kentucky*. The Appeal Board then remanded the cause to the Atomic Safety Licensing Board with instructions to locate the 1792 low-water mark and to determine if the Marble Hill discharge pipes would end in Kentucky water or Indiana water.

On remand, both the utility and the Nuclear Regulatory Commission staff presented evidence as to the location of the 1792 low-water mark. Kentucky declined to present evidence. The Licensing Board found that based upon the evidence presented, the discharge pipe of the power plant would be well within Indiana waters, on the northern side of the 1792 low-water mark. 7 NRC at 577-580. The ASLAB affirmed the decision of the Licensing Board on appeal. 8 NRC 253.

Thus, in proceedings of record, the 1792 low-water mark has been ascertained in a proceeding in which Kentucky actively participated. The evidence presented to the Atomic Safety Licensing Board and the decision of

the Atomic Safety Licensing Appeal Board clearly illustrate the deficiency in Kentucky's present argument that a rule of convenience requires the establishment of an ever-changing boundary based upon the present day low-water mark.

II. THE CONCLUSION OF THE SPECIAL MASTER IS NOT PREMISED UPON A FINDING OF AN AVULSIVE CHANGE IN THE OHIO RIVER.

A. THE CONCLUSION OF THE SPECIAL MASTER IS A CONCLUSION OF LAW IN FULL ACCORD WITH THE PRIOR DECISIONS OF THIS COURT.

At p. 27 of its brief, Kentucky argues:

> The Speecial Master here made his findings that the small dams on the Ohio were avulsive in nature on a record barren of facts.

Ohio has reviewed the report of the Special Master and has concluded that the Special Master neither made a finding nor intended to make a finding that the changes in the Ohio River caused by locks and dams were avulsive in nature. The most the Special Master's Report contains is a reference to inundation of the river banks as a result of dams built on the river and that reference is supported by citation to this Court's decision in *Ohio v. Kentucky*, 410 U.S. 641 (1973), and citation to Reports issued by Kentucky's own Legislative Research Commission. Report at 5-6.

The references made by the Special Master regarding inundation are far from findings as to an avulsive change in the river and do not form any part of the basis for his ultimate conclusion as to the true location of the boun-

dary between Ohio and Kentucky. Kentucky has erroneously characterized the Special Master's statement of the history of this case as a finding and has then mounted an attack on that purported finding in an attempt to undermine the whole of the Special Master's Report.

B. WHETHER AN AVULSIVE CHANGE HAS OCCURRED IN THE OHIO RIVER IS A QUESTION OF FACT TO BE DETERMINED ONLY IF THIS COURT REJECTS THE CONCLUSION OF THE SPECIAL MASTER.

This Court need not address the issue of whether an avulsive change has occurred in the Ohio River unless it determines that the Special Master erred in his conclusion that under this Court's decision in *Indiana v. Kentucky*, the boundary between Ohio and Kentucky is the 1792 low-water mark. In that event, Ohio would agree with Kentucky that an evidentiary hearing would be necessary to determine whether any avulsive changes have occurred as a result of the dams built on the Ohio River. Kentucky's Brief at 27.

Ohio would strongly disagree, however, with Kentucky's contention that the erection of artificial structures can never cause an avulsive change. In its own brief at p. 12 Kentucky cites to the Court's decision in *Arkansas v. Tennessee*, 246 U.S. 158 (1918), wherein the Court noted:

> if the stream from any cause, *natural or artificial*, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary . . .
>
> *Id.* at 173. (emphasis added).

Thus an avulsion may occur from natural *or* artificial causes.

Whether any avulsive changes have occurred is a question of fact and under paragraph 10 of the stipulation entered into between Ohio and Kentucky, questions of fact are reserved for further evidence. Report, Appendix A, Item 10. No such evidence has been taken in this case[5] and none need be taken if the Court affirms the conclusion and recommendation of the Special Master.

III. THE SPECIAL MASTER'S ANALYSIS OF KENTUCKY'S ACQUIESCENCE IN THE 1792 LOW-WATER MARK PROPERLY SUPPORTS THE CONCLUSIONS OF LAW REACHED BY THE SPECIAL MASTER UNDER THE PRIOR DECISIONS OF THIS COURT.

As noted above, the Special Master based his conclusion and recommendation upholding Ohio's claim on the prior decisions of this Court. His conclusion was not premised upon a finding of acquiescence by Kentucky in the 1792 low-water mark and the adoption of his recommendation is not conditioned upon this Court's finding an equitable bar against Kentucky. The Special Master's discussion of acquiescence does support his conclusion and recommendation, however, and Kentucky's attempts to dispute the evidence reviewed by the Special Master are not persuasive.

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[5] In view of the admitted lack of evidence on the issue of avulsion, Kentucky's casual statements on page 29 of its brief to the effect that the construction of dams on the Ohio River has wrought no great change in the course of the river are objectionable as being totally unsupported by the record.

Kentucky claims that a legislative compact between Indiana and Kentucky which was approved by Congress in 1943 "conclusively establish(ed) the current low-water mark on the northerly side of the Ohio River, as it exists at any given time, as the entire boundary between Indiana and Kentucky, with the exception of the Green River Island area . . ." Kentucky's Brief at 30. Based upon this compact, Kentucky argues that, as a matter of law, it cannot be held to have acquiesced in the 1792 low-water mark. According to Kentucky:

> It is thus beyond cavil that Indiana and Kentucky through their legislatures confirmed that their entire boundary, except for that portion fixed by survey at Green River Island, is the low-water mark on the northern side of the Ohio River at any given time, as affected by the processes of accretion and erosion.
>
> Kentucky's Brief at 32.

Kentucky's arguments with respect to the 1943 compact were not presented to, and thus not passed upon, by the Special Master. However, Kentucky's interpretation of the 1943 compact was presented to the Nuclear Regulatory Commission's Atomic Safety and Licensing Appeal Board in connection with the Marble Hill licensing proceeding discussed above. 8 NRC 253.

The ASLAB devoted a substantial portion of its opinion to Kentucky's arguments regarding the 1943 compact and concluded:

> Kentucky's position thus rests on nothing more than its reading of the boundary description contained in the compact. This traces the 1896 survey and the new lines run in 1942 "to the low-water mark on the right side of the Ohio River" and thence

upstream and downstream "at low-water mark on the right side of said river." Kentucky says the term "low-water mark" used there must mean the *present* mark. But the compact does not say that and, in light of its history, we may not reasonably infer that meaning.

First, to do so would mean abandonment of the historic low-water mark which the Supreme Court had approved in *Indiana v. Kentucky* as the demarcation between those states. Were the interstate agreement intended to overturn that decision, we are confident it would have said so expressly in these circumstances.

Second, for reasons we have mentioned, we do not find the historic line and the current low-water mark incompatible. Rather, we agree with the staff that the 1942 lines were simply drawn arbitrarily to close a gap left in the area of Green River Island, an *ad hoc* political solution (in the best sense of that term) to a thorny local boundary dispute. Were the entire Kentucky-Indiana border of several hundred miles involved, that would have been made unmistakable in light of interests elsewhere along the river which would be affected by such a change. We find it hard to believe that the Ohio has remained in its historic channel everywhere except at Green River Island.

Finally, the "simple" answer which Kentucky derives from its reading of the compact is inconsistent with the nature of the problem sought to be remedied. The Commonwealth fails to explain why the two states would wish to disturb a boundary for hun-

> dreds of miles to close a gap of a few hundred yards. As we have observed before, "in construing statutes, 'context and purpose outweigh syntax'."
>
> 8 NRC 253 at 264-265 (footnotes omitted).

Kentucky also suggests in its brief that the state of Indiana agrees with Kentucky's position that the 1943 compact established the entire boundary between the two states at the present day low-water mark. As Kentucky is aware, the state of Indiana has expressly rejected that interpretation in another Original Action now pending before this Court. *Kentucky v. Indiana*, Original No. 81 (October Term, 1978).

In its Brief in Opposition to Kentucky's Motion for Leave to File Complaint, Indiana, through its Attorney General, stated its position regarding the boundary line between the two states as follows:

> Litigation regarding various boundary disputes between Indiana and Kentucky was commenced as early as 1820, or four years after Indiana became a State. Those various disputes have resulted in decisions favorable to both states. One common thread connecting the decisions issued by this Court in those cases is that *the boundary line is the low-water mark on the Indiana side of the Ohio River as it existed when Kentucky became a state.*
>
> Now, however, Kentucky is asking this Court to declare the boundary line between Indiana and Kentucky to be "the low-water mark on the northerly side of the Ohio River as it presently exists . . ." This change of position, coming more than eighty years after the last decision by this Court, is completely unjustified and should be disallowed.

Indiana's Brief in Opposition to Motion for Leave

to File Complaint, Original No. 81, (October Term, 1978) at p. 3.

Thus, it seems clear that Kentucky's current interpretation of its 1943 compact with Indiana is neither shared by Indiana nor accepted by the federal administrative bodies which have been called upon to interpret the compact.

It also seems clear that the 1943 compact does not undermine the significance which the Special Master attached to the evidence discussed in his Report concerning Kentucky's acquiescence in the 1792 low-water mark. The Special Master noted that reports issued by the Kentucky Legislative Research Committee and an Opinion issued by the Kentucky Attorney General both recognize the low-water mark on the northern shore of the Ohio River as it existed in 1792 to be the boundary between Kentucky and Indiana. Report at 13. It is important in this regard to note that both the legislative research reports and the Attorney General's Opinion were prepared over twenty years *after* the 1943 compact which Kentucky now argues conclusively established the boundary at the present day low-water mark.

The conclusion reached in the legislative research reports and the Attorney General's Opinion are also supported by various decisions from Kentucky's state courts. For example, in *Perks v. McCracken,* 169 Ky. 590, 184 S.W. 891 (1916), the Kentucky Court of Appeals stated the issue concerning the ownership of an island in the Ohio River lying between Kentucky and Illinois as follows:

The case turns on whether or not the island is Ken-

> tucky territory or is a part of the state of Illinois. When Virginia ceded to the United States the Northwest Territory in the year 1784, she retained title to the bed of the Ohio river to the low-water mark on its north or northwest side. When Kentucky became a state on June 1, 1792, she succeeded to the rights of Virginia. Her jurisdiction continues just as it existed at the time of her admission to the Union, and is not affected by the action of the forces of nature upon the course of the river. *State of Indiana v. State of Kentucky*, 136 U.S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 329; *Church v. Chambers*, 3 Dana, 279; *McFarland v. McKnight*, 6 B. Mon. 500; *Fleming v. Kenney*, 4 J. J. Marsh, 155. The question is, where was the low-water mark at the time Kentucky became a state, and does the island in question lie between the low-water mark as it then existed and the Kentucky shore? If so, it is a part of Kentucky.
>
> *Id.* at 184 S.W. 891.

In sum, the evidence cited by the Special Master regarding Kentucky's acquiescence in the 1792 low-water mark fully supports the conclusion and recommendation reached by the Special Master under the prior decisions of this Court. Furthermore, Kentucky's assertion in its statement of facts that Kentucky has always claimed the present day low-water mark as its boundary is contradicted by the reports and opinion referred to above. Kentucky's new argument regarding the 1943 Kentucky-Indiana compact does nothing to undermine the conclusion reached by the Special Master in his Report to this Court.

CONCLUSION

The conclusion of the Special Master that the boundary between Ohio and Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 is fully supported by the prior decisions of this Court. The recommendation of the Special Master that this Court establish the 1792 low-water mark as the boundary between Ohio and Kentucky should therefore be adopted. Ohio further agrees to and supports the three additional recommendations of the Special Master which appear at pp. 16 and 17 of his Report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael R. Szolosi, Special Counsel to the Attorney General of the State of Ohio and a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of June, 1979, I served three copies of the foregoing Reply Brief, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky and to Judge Robert Van Pelt, Special Master.

Michael R. Szolosi
Special Counsel
to the Ohio Attorney General

Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - Plaintiff,

versus

COMMONWEALTH OF KENTUCKY, - Defendant.

BRIEF OF KENTUCKY IN RESPONSE TO REPLY BRIEF OF OHIO TO EXCEPTIONS AND MOTION FOR LEAVE TO FILE

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY - - *Defendant.*

MOTION FOR LEAVE TO FILE BRIEF

Defendant Commonwealth of Kentucky moves the Court for leave to file BRIEF OF KENTUCKY IN RESPONSE TO REPLY BRIEF OF OHIO TO EXCEPTIONS, sixty (60) copies of which are tendered herewith, and as grounds states:

1. This original action is a controversy over the entire boundary between two sovereign states.

2. The current submission to the Court on Exceptions to the Report of the Special Master is in such a posture that it should resolve the controlling legal principles, and may dispose of the entire case.

3. The brief tendered is actually in the sequence and nature of a reply brief, and is essential to a proper understanding of Kentucky's position on matters raised in Ohio's brief. In the decisive posture of this case, the Court and parties should have the benefit of such a brief which the rules authorize as a matter of

course on appeals and writs of certiorari. Supreme Court Rule 41(3).

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - *Defendant.*

BRIEF OF KENTUCKY IN RESPONSE TO REPLY BRIEF OF OHIO TO EXCEPTIONS

QUESTIONS PRESENTED

Whether the Boundary Between Kentucky and Ohio Is the Low-Water Mark on the Northerly Side of the Ohio River as it Existed in 1792 or the Prevailing Low-Water Mark on the Northerly Side Under I) Principles of River Boundaries, and II) Principles of Acquiescence.[1]

---

[1]Kentucky accepts Ohio's assertion that the Special Master neither made nor intended to make any finding as to the effect of the dams. Since it appears the only purpose of Section II of Ohio's Brief (pp. 20-22) was to establish that point, that Section is not an issue before the Court.

ARGUMENT

I

The Ohio River Itself at the Prevailing Low-Water Mark[2] on the Northerly Side is the Boundary Between Kentucky and Ohio; Indiana v. Kentucky Determined a Land Boundary Along an Abandoned Channel and Is Inapposite.

Ohio consumes a major portion of its brief with its obsession that *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), fixed the now long-obscured 1792 location of the northerly low-water mark as Kentucky's boundary along the entire Ohio River. As the following discussion of the Court's opinion demonstrates, that view is erroneous.

The Contentions:

The competing contentions of Kentucky and Indiana in that case are tersely stated on the first page of the Court's opinion and are, in full, 136 U. S. at 503:

> Kentucky alleges that when she became a State on the 1st of June, 1792, this tract was an island in the Ohio River, and was thus within her boundaries, which had been prescribed by the act of Virginia creating the District of Kentucky. The territory assigned to her was bounded on the north by the territory ceded by Virginia to the United States. The tract in controversy was then and has

[2]Kentucky contends the boundary is the present or current northerly low-water mark as it may exist at any given time as affected by the processes of accretion and erosion. For brevity this boundary will be referred to in this brief simply as the "prevailing low-water mark."

ever since been called Green River Island. Kentucky founds her claim to its possession and to jurisdiction over it upon the alleged ground that at that time the river Ohio ran north of it, and her boundaries extended to low-water mark on the north side of the river; also upon her long undisturbed possession of the premises, and the recognition of her rights by the legislation of Indiana.

Indiana rests her claim also upon the boundaries assigned to her when she was admitted into the Union on the 11th of December, 1816, of which the southern line was designated "as the river Ohio from the mouth of the Great Miami River to the mouth of the Wabash." This boundary, as she alleges, embraces the island in question, she contending that the river then ran south of it, and that a mere bayou separated it from the mainland on the north.

The Law:

The Court then analyzed the legal history of the northern boundary of Kentucky along the Ohio River, including the cession of Virginia, an 1810 Kentucky statute legislating the northwest side of the river as the boundary, the holding in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), that the low-water mark of the river itself on the northwest side is the boundary, and Kentucky decisions following the holding in *Handly's Lessee,* 136 U. S. at 503-507. The Court quoted from *McFall* v. *Commonwealth,* 59 Ky. (2 Metc.) 394 (1859) in which Kentucky's highest court stated:

> That *the boundary and jurisdiction of the State of Kentucky rightfully extend to low-water mark*

> *on the western or northwestern side* of the river Ohio must now be considered as settled. 136 U. S. at 507 (emphasis added).

In concluding its discussion of the law, the Court stated that Kentucky's boundary rights could not be affected "by the fact that the channel in which the river once ran is now filled up." Following *Missouri* v. *Kentucky,* 78 U. S. (11 Wall.) 395 (1871), the Court held that the principle which must control under the facts of *Indiana* v. *Kentucky* was "precisely that" which would control if the river's waters so departed "from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky." This principle is that the abandonment of a river channel will not affect the location of a boundary defined by the original channel. *Missouri* v. *Kentucky, supra,* at 401. Rather, as stated in *Indiana* v. *Kentucky,* such boundary will continue "unaffected by the action of the forces of nature upon the *course* of the river." 136 U. S. at 508 (emphasis added).

The Issue:

The Court then stated the determinative issue in the case as follows:

> *The question then becomes one of fact,* did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established? 136 U. S. at 509 (emphasis added).

The Facts and Decision:

After extensive and detailed analysis of the facts, the Court found that the waters did pass in that channel when Kentucky became a state and that the boundary must run on the line of the northerly low-water mark of that channel as nearly as it could be ascertained after the channel had been filled.

What Was and Was Not Decided in Indiana v. *Kentucky:*

The opinion in *Indiana* v. *Kentucky* discussed the two basic principles relating to streams as boundaries. The first — that the boundary usually follows the stream itself — was discussed with approval in regard to *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820). The second — that abandonment of a channel does not change a river boundary — as applied in *Missouri* v. *Kentucky,* 78 U. S. (11 Wall.) 395 (1871), was "precisely that" which governed at Green River Island. *Indiana* v. *Kentucky* is therefore nothing more nor less than an application of the principle that the forces of nature which effect abandonment of a channel do not change the boundary.

The decision in *Indiana* v. *Kentucky* was restricted to fixing a boundary on dry land along the filled Green River Island channel. The opinion discussed no issue as to any change in the low-water mark between the time Kentucky became a state in 1792 and the time Indiana became a state in 1816. Clearly, no such issue was decided. The core issue in that original action was not even an issue of law but rather of fact, i.e., whether

the waters of the Ohio flowed in the channel north of Green River Island when Kentucky became a state in 1792. The only significance of when Kentucky became a state was that the island was then within its domain. That domain could not be divested through nature's subsequent change in the river's course by filling of the channel before Indiana became a state in 1816.[3] In other words, simply put, as between these two times the factual situation at the time Kentucky became a state controlled. Thus, the Court ruled that the Green River Island boundary line must run on the northerly low-water mark of the channel, now abandoned, which had existed when Kentucky became a state in 1792.

How Indiana v. *Kentucky and Handly's Lessee* v. *Anthony Have Been Applied by the Respective States:*

The universally accepted principle that the boundary follows the stream, recognized in *Handly's Lessee*

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[3]The abandoned-channel principle is twisted by Ohio to mean that *no* change in the river since 1792 could change the boundary. Ohio's misunderstanding is at odds with the universally accepted principle that changes in a boundary stream *do* change the boundary when the stream remains in its original channel. See *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918); *Nebraska* v. *Iowa,* 143 U. S. 359 (1892).

It is clear from the context that "the action of the forces of nature upon the course of the river," in the Court's opinion in *Indiana* v. *Kentucky,* 136 U. S. at 508, refers to abandonment of a channel and not to changes in the original channel. In *Missouri* v. *Kentucky,* 78 U. S. (11 Wall.) 395 (1871) at 401, cited for the "precisely" controlling principle in *Indiana* v. *Kentucky,* that principle is stated in this way (we have supplied facts from *Indiana* v. *Kentucky* in brackets):

> "If the river has subsequently *turned its course,* and now runs east [south] of the island [tract], the status of the parties to this controversy is not altered by it, for the channel which the river *abandoned* remains, as before, the boundary between the States and the island [tract] does not, in consequence of *this* action of the water, change its owner." (emphasis added).

v. *Anthony,* applies to Kentucky's Ohio River boundary, in the absence of a channel change as at Green River Island. Consistent application of this principle is documented in the histories of Kentucky, Indiana and Ohio, set out below,[4] over almost a century preceding this Court's decision in *Indiana* v. *Kentucky* and almost a century following it. The low-water mark boundary is the prevailing low-water mark under this principle, and none of the many authoritative references to the river or low-water mark as the boundary suggests a 1792 mark.

Application in This Case:

Thus, Ohio's construction of *Indiana* v. *Kentucky* misconstrues the Court's opinion, defies legal principle and precedent, and is refuted by almost two centuries of history surrounding Kentucky's northern boundary. The applicable rule rejects Ohio's contention and places Kentucky's boundary with Ohio along the Ohio River at the prevailing low-water mark on the northerly side.

II

For Almost Two Centuries Kentucky, Ohio and Indiana Have Treated the Prevailing Northerly Low-Water Mark as Their Boundary Along the Ohio River; the Doctrine of Acquiescence Precludes Retroactive Fixing of an Artificial Mark at a Presumed 1792 Level.

Ohio insists that Kentucky has acquiesced. To the contrary, it is Ohio that has acquiesced in the prevailing low-water mark as the boundary.

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[4] *Infra,* pp. 10-12.

Kentucky has always asserted dominion to the prevailing low-water mark on the northerly side. The first recorded history of its assertions is the 1810 legislative enactment referred to in *Ohio* v. *Kentucky,* 410 U. S. 641, 650 (1973). Since then, in an unbroken line of decisions, Kentucky's highest court has recognized the northerly low-water mark boundary.[5] *See Commonwealth* v. *Henderson Co.,* 371 S. W. 2d 27 (Ky. 1963); *Louisville Sand & Gravel Co.* v. *Ralston,* 266 S. W. 2d 119 (Ky. 1954); *Shannon* v. *Streckfuss Steamers,* 279 Ky. 649, 131 S. W. 2d 833 (1939); *City of Covington* v. *State Tax Commission,* 231 Ky. 606 21 S. W. 2d 1010 (1929); *Willis* v. *Boyd,* 224 Ky. 732, 7 S. W. 2d 216 (1928); *Bedford-Nugent Co.* v. *Herndon,* 196 Ky. 477, 244 S. W. 908 (1922); *Nicoulin* v. *O'Brien,* 172 Ky. 473, 189 S. W. 724 (1916), *aff'd.,* 248 U. S. 113 (1918); *Ware* v. *Hager,* 126 Ky. 324, 103 S. W. 283 (1907); *Commonwealth* v. *Louisville & E. Packet Co.,* 117 Ky. 936, 80 S. W. 154 (1904); *Meyler* v. *Wedding,* 107 Ky. 310, 53 S. W. 809 (1899), *rev'd. on other grounds,* 192 U. S. 573 (1899); *Louisville Bridge Co.* v. *City of Louisville,* 81 Ky. 189, 5 Ky. L.R. 16 (1833); *Berry* v. *Snyder,* 66 Ky. (8 Bush.) 266 (1867); *Spalding* v. *Simms,* 61 Ky. (4 Metc.) 285 (1863); *McFall* v.

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[5]The northerly low-water mark referred to in these decisions necessarily means the prevailing low-water mark under the universally accepted principle that the boundary follows the stream in its original channel. See *Arkansas* v. *Tennessee,* 246 U. S. 638, 647, 648 (1918); *Nebraska* v. *Iowa,* 143 U. S. 359, 361-62 (1892); *Berry* v. *Snyder,* 66 Ky. (3 Bush.) 266, 279 (1867).

Ohio cites *Perks* v. *McCracken,* 164 Ky. 590, 184 S. W. 891 (1916) as support for the 1792 mark. Ohio's Reply Brief, p. 26. However, examination of that case shows it is simply an application of the abandoned-channel rule of *Indiana* v. *Kentucky.*

Commonwealth, 59 Ky. (2 Metc.) 394 (1859); *McFarland* v. *McKnight,* 45 Ky. (6 B. Mon.) 500 (1846); *Church* v. *Chambers,* 33 Ky. (3 Dana.) 274 (1835); *Fleming* v. *Kenney,* 27 Ky. (4 J.J. Marsh) 155 (1830).

All of the cases of Ohio's courts referring to the low-water mark boundary are to the same effect. *See Dickow* v. *Cincinnati,* 31 Ohio St. 226 (Hamilton Co. C. P. 1920); *State Board of Health* v. *City of Greenville,* 86 Ohio St. 1, 98 N. E. 1019 (1912); *State of Ohio* v. *Savors,* 15 Ohio C.C.R. (n.s.) 65 (Cir. Ct. Columbiana Co. 1911); *Winifrede Coal Co.* v. *Central Ry. & Bridge Co.,* 11 Ohio Dec. Reprint 35 (Hamilton C. P. 1890); *Newport & Cincinnati Bridge Co.* v. *Commissioners of Hamilton Co.,* 8 Ohio Dec. Reprint 564 (Hamilton Dist. Ct. 1883); *Booth* v. *Shepherd,* 8 Ohio St. 243 (1858); *State* v. *Hoppess,* 1 Ohio Dec. Reprint 105 (Sup. Ct. Ohio, Montgomery Co. 1845); *Lessee of Blanchard* v. *Porter,* 11 Ohio 139 (1841); *Benner's Lessee* v. *Platter,* 6 Ohio 504 (1834); *Lessee of McCullock* v. *Aten,* 2 Ohio 307 (1826).

The same may be said for Indiana courts. *See Memphis & C. Packet Co.* v. *Pikey,* 142 Ind. 304, 40 N. E. 527 (1895); *Welsh* v. *State,* 126 Ind. 71, 25 N. E. 883 (1890); *Sherlock* v. *Alling,* 44 Ind. 184 (1873), *aff'd.* 93 U. S. (3 Otto.) 99 (1876); *Carlisle* v. *The State,* 32 Ind. 55 (1869); *Gentile* v. *The State,* 29 Ind. 409 (1868).

As well as Illinois. *See Joyce-Watkins Co.* v. *Industrial Commission,* 325 Ill. 378, 156 N. E. 346 (1927).

Federal courts in Kentucky and Indiana have described the boundary in the same way as have the state

courts. *See Inland Barge Co.* v. *Nasbitt,* 210 F. Supp. 690 (S.D. Ind. 1962); *Walker* v. *Felmont Oil Corp.,* 136 F. Supp. 584 (W.D. Ky. 1955), *vacated on other grounds,* 240 F. 2d 912 (6th Cir. 1957); *Paducah-Illinois R. Co.* v. *Graham,* 46 F. 2d 806 (W.D. Ky. 1931).

As early as 1859, Kentucky's highest court stated in *McFall* v. *Commonwealth,* 59 Ky. (2 Metc.) 394, 396 (1859),

> That the boundary and jurisdiction of the state of Kentucky rightfully extend to low-water mark on the western or northwestern side of the Ohio River, must now be considered as settled.

No decision of any of these states disputes the matter. The 1943 Compact between Indiana and Kentucky, which fixed their entire boundary along the Ohio River, further illustrates that both states have always regarded the prevailing low-water mark on the northerly side of the Ohio as their boundary in all areas where the river has remained in its original channel. Although Ohio disputes this, it cannot overcome the unmistakable language of the compact which established "the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement" as the Green River Island survey line of *Indiana* v. *Kentucky* extended by the compact to low-water mark at its upstream and downstream sides, *and* the "low water mark" upstream and downstream "forming the remainder of the boundary line." Kentucky's Brief in Support of Exceptions, Appendix, pp. 35, 36.

Ohio premises its argument against the compact on the dual theory taken from an administrative opinion of the United States Nuclear Regulatory Commission that 1) the States would not so easily overturn *Indiana* v. *Kentucky,* viewed as precedent for a 1792 mark, and that 2) in resolving a matter precipitated by the Green River Island dispute the States would not undertake "to disturb a boundary for hundreds of miles." Ohio's Reply Brief to the exceptions of Kentucky to the Special Master's Report, hereinafter Ohio's Reply Brief, pp. 24-25.

Neither premise is correct. On the first, the abandoned-channel principle of *Indiana* v. *Kentucky,* as we have shown above, is not contrary to the rule that the boundary follows the stream in its original channel, but rather is perfectly consistent with and complementary to it. On the second, given the legal principles and history which existed when the compact was adopted, it did not "disturb" the prevailing low-water mark boundary but rather recognized and confirmed it by enrolling in the legislative records of the two States the same boundary which was already ingrained in the histories of those States and followed with unanimity in their judicial decisions. To do otherwise would have required abnegation of everything that had gone before the compact.

Ohio also argues the 1943 Compact does not evidence Indiana's agreement to the prevailing low-water mark boundary because that interpretation is rejected in the position taken in filings by Indiana's attorney general in *Kentucky* v. *Indiana,* Original No. 81 (Oc-

tober Term, 1978). Ohio's Reply Brief, p. 25. However, the position pleaded by Indiana's attorney general in this Court in 1979 is of no greater significance "at this very late date" than was the pleading of Ohio's attorney general attempting to raise "the middle-of-the-river issue" in *Ohio* v. *Kentucky,* 410 U. S. 641, 649 (1973). As in that case, if the boundary has been established by principle, by acquiescence, or by compact, before Indiana's filing here, the contention in that filing cannot overcome the established boundary.

Nothing in the authoritative history[6] of the three States pertaining to the low-water mark boundary suggests that the boundary is anything other than the prevailing low-water mark as established under the controlling principle that the boundary follows the stream in its original channel.

Ohio contends that Kentucky has acquiesced, but the above decisions of Kentucky's highest court and enactments of Kentucky's legislature show that without exception Kentucky has always claimed the prevailing low-water mark boundary. On the other hand, what response has Ohio made to counter this lengthy history of the prevailing low-water mark as the boundary from the time of the beginning of that history not later than 1810 until the filing of this action? None. Rather, its courts have consistently endorsed that

[6]Considering Kentucky's lengthy and positive legislative and judicial assertions of sovereignty to the prevailing low-water mark, statements relied on by Ohio from an opinion of an assistant attorney general and a report of a service agency of the state's legislature do not and cannot express the sovereign position of the Commonwealth of Kentucky.

And right or wrong, views in such documents have no legal weight and are not binding in a court of law.

boundary. As with the northern half of the river in *Ohio* v. *Kentucky,* 410 U. S. 641, 649 (1973), Ohio has long acquiesced "in the location of its southern border at the northern edge of the Ohio River, and its persistent failure to assert a claim to the" 1792 low-water mark means "it may not raise the . . . issue at this very late date."[7]

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[7]Acceptance of Ohio's position might produce paradoxical results. Considering the phenomenal effects of accretion and erosion on large and active rivers, see *Missouri* v. *Kentucky,* 78 U. S. (5 Wheat.) 374, at 408-411 (1871), it may be assumed that along the Ohio there have been numerous substantial accretions to the shores of Kentucky's bordering states. For instance, the case of *Ellis* v. *Chestnut,* 289 S. W. 2d 741 (Ky. 1956), involved 35 acres which had accreted to the Illinois shore of the Ohio River across from Kentucky. Under the rule that the boundary follows the stream, the Kentucky court held the acreage to be in Illinois and not Kentucky.

Ironically, however, if Ohio's position is adopted, accretions to the *Ohio, Indiana* and *Illinois* shores south of the 1792 low-water mark on the northern side of the river would be in *Kentucky.* This would have far-reaching legal and political effects in such areas and would divest Ohio, Indiana and Illinois of concurrent jurisdiction over the river wherever their shores are so eliminated.

Such a transfer of sovereignty would be bizarre. Carried to its logical conclusion, however, this is where Ohio's argument leads.

CONCLUSION

It makes no difference from which perspective, that of strict legal principle or that of acquiescence, this case is viewed. Under either, the controlling legal principle that the boundary follows the stream, or Ohio's long acquiescence in the lengthy and uninterrupted history of such a view, the boundary between Kentucky and Ohio is the prevailing northerly low-water mark of the Ohio River. Final decree should be entered accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for defendant, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of July, 1979, I served the foregoing brief on the Special Master and the plaintiff by depositing in the U. S. Mail, first class postage prepaid, three copies each addressed to Judge Robert Van Pelt, Special Master, 566 Federal Building, Lincoln, Nebraska 68508; Michael R. Szolosi and Steven C. Fitch, Special Counsel to the Ohio Attorney General, Gingery, Palmer & Szolosi, 140 E. Town Street, Columbus, Ohio 43215, and Counsel for the plaintiff Howard B. Abramoff, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215.

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